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No. 14521

United States
Court of Appeals
for the Ninth Circuit

PANTHER OIL & GREASE MANUFACTUR-
ING COMPANY, a Corporation,
Appellant,
vs.

JOHN NORMAN SEGERSTROM, as adminis-
trator of the Estate of H. N. Segerstrom, de-
ceased,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

DEC 24 1951

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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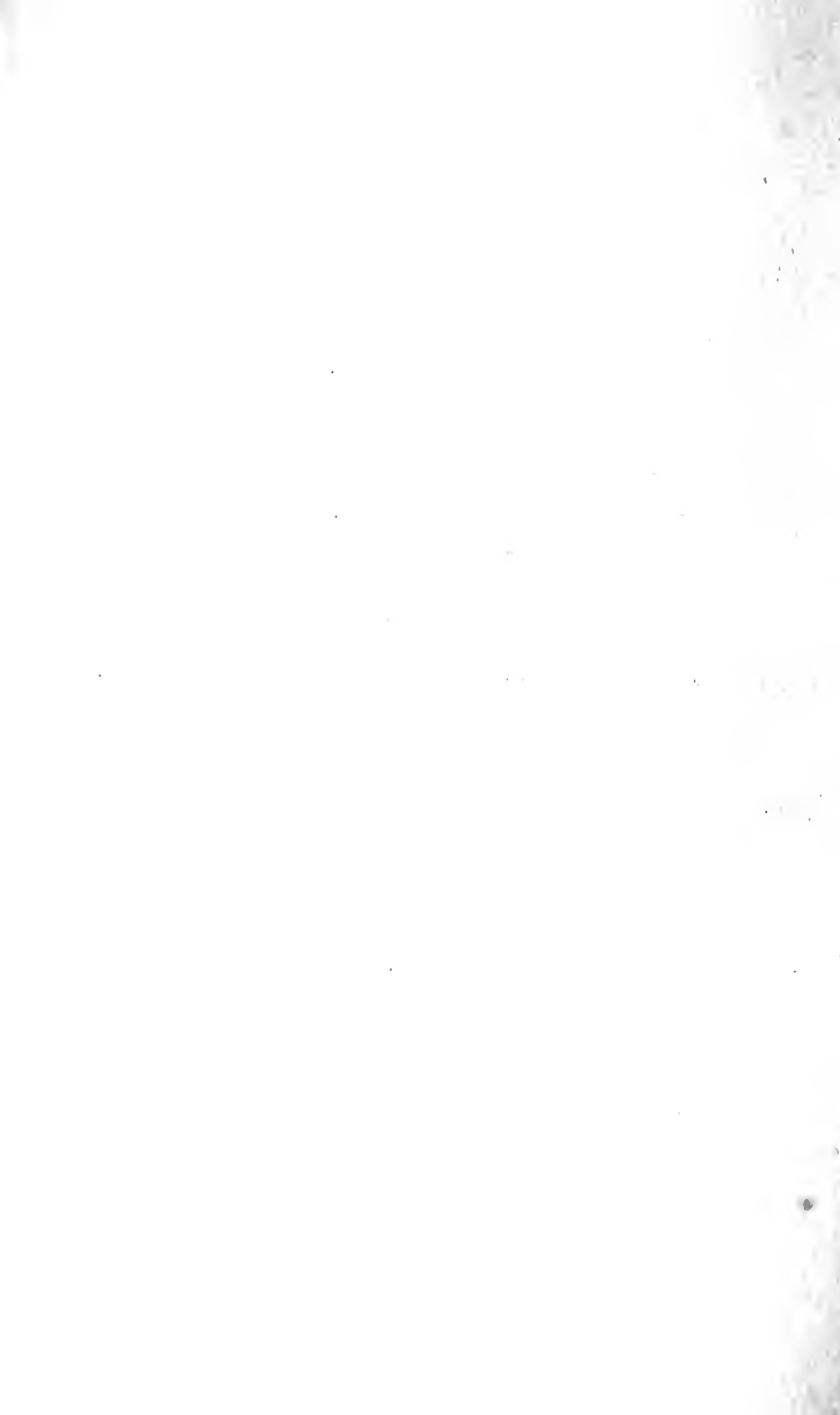
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Attorneys for Appellee.



In the District Court of the United States, Eastern
District of Washington, Northern Division

No. 1149

JOHN NORMAN SEGERSTROM, as Administra-
tor of the Estate of H. N. SEGERSTROM, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas corporation,
Defendant.

PETITION FOR REMOVAL

To the United States District Court for the Eastern
District of Washington, Northern Division:

Comes now Panther Oil & Grease Manufacturing
Co., a Texas corporation, defendant in the above
cause, and file this its Petition for Removal of this
cause from the Superior Court of the State of
Washington in and for the County of Spokane, in
which it is now pending, to the District Court of
the United States for the Eastern District of Wash-
ington, in the Northern Division, in the City of
Spokane, in said District and State, and show to
the court the following facts:

I.

That this cause was commenced in the above de-
scribed Superior Court of the State of Washington,
in Spokane County, on about the 5th day of Octo-
ber 1953, in that a claimed service of process was
made on the petitioner on, to-wit, October 5, 1953,

and that a copy of plaintiff's complaint setting forth the claim of relief upon which the action was based, was first received by the petitioner on the 7th day of October 1953. That said Complaint [1*] has not been filed in said Superior Court at the time of filing this petition.

II.

That this action is one of a civil nature over which the district courts of the United States have original jurisdiction, the said action having been brought by the plaintiff against the defendant to recover damages for alleged breach of express warranty or alleged breach of implied warranty in the use of certain products and materials sold by the petitioner to the plaintiff, which it is claimed and alleged was not fit for the purpose intended, which product, it is claimed, was inflammable and explosive and that the plaintiff was not warned thereof.

III.

The matter in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs, the suit being for the sum of \$361,000.00, as will more fully appear from the Summons and Complaint, a copy of which is hereto attached, marked Exhibit "A" and is hereby referred to and made a part hereof.

IV.

That at the time of the commencement of this action and ever since that time, the plaintiff was and is now a citizen and resident of the State of

* Page numbers appearing at foot of page of original Transcript of Record.

Washington and of the County of Spokane in said state, and the said defendant, Panther Oil & Grease Manufacturing Co., was and still is a corporation incorporated and existing under and by virtue of the laws of the State of Texas, with its principal office at Fort Worth in said State, and is now and was a citizen of said state, and that the said defendant and petitioner is not now, nor was not at the time of the institution of the action, and has not at any time been a resident of the State of Washington, or citizen thereof. [2]

V.

That the said defendant files herein and herewith a good and sufficient bond with good and sufficient sureties, for paying all costs and disbursements that might be incurred by reason of the transfer of these proceedings to this court, if this court should hold that the action was not removable or improperly removed thereto, as provided by the statutes of the United States.

Wherefore, your petitioner prays for the removal of the above entitled cause from the said State Court to this court.

Dated this 23rd day of October 1953.

/s/ PAINE, LOWE & COFFIN,

/s/ GRAVES, KIZER & GRAVES,

Attorneys for Petitioner

Of Counsel: Signed R. E. Lowe, J. W. [Illegible].

Duly Verified. [3]

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents: That we, Panther Oil & Grease Manufacturing Co., a corporation, as principal, and Maryland Casualty Company, as surety, authorized to become sole surety on judicial bonds in the State of Washington, and in this court, are held and firmly bound unto John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, plaintiff in the above entitled action, in the just and full sum of Five Hundred Dollars (\$500.00), lawful money of the United States, well and truly to be paid.

This bond is conditioned nevertheless, that whereas the said plaintiff has commenced the above entitled action in the Superior Court of the State of Washington, in and for the County of Spokane, and said defendant has filed in the said District Court its Petition for Removal of said cause to the District Court of the United States, for the Eastern District of Washington.

Now Therefore, if petitioner-defendant, Panther Oil & Grease Manufacturing Co., a corporation, shall pay all costs and disbursements incurred by reason of the removal proceedings, if it should be determined that the cause was not removable or was [10] improperly removed to the District Court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we, the principal and

surety, have caused this instrument to be executed and our hands and seals affixed this 23rd day of October, 1953.

PANTHER OIL & GREASE MANUFACTURING CO., a corporation,

/s/ By R. E. LOWE,
Its Agent and Attorney,
Principal

[Seal] MARYLAND CASUALTY COMPANY, a corporation,

/s/ By KATHRYN HOWLAND,
Its Attorney in Fact [11]

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains of defendant and alleges:

I.

At all times herein mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Texas, and at all times herein mentioned has been doing business and now is doing business within the State of Washington, and is now subject to the jurisdiction of the Courts of this state.

At all times herein mentioned, defendant, among other things, manufactured and sold certain roofing materials known as "Battleship roof coating" and

"Battleship roofing primer." At all times herein mentioned, one C. E. Brynildson was an agent and employee of defendant, duly authorized by defendant to sell the aforesaid products for defendant and to make the representations hereinafter mentioned for the purpose of furthering the sale of defendant's products, and said C. E. Brynildson was, as to the matters hereinafter mentioned, at all times acting within the scope of his authority and for the use and benefit of defendant.

II.

At all times herein mentioned, the plaintiff John Norman Segerstrom was and now is the duly appointed, qualified and acting [12] Administrator of the Estate of H. N. Segerstrom, Deceased, by virtue of Letters of Administration issued to him out of the Superior Court of the State of Washington in and for the County of Spokane, in Probate Cause No. 47366 therein. At all times herein mentioned said estate and plaintiff as Administrator of said estate owned a large concrete cold storage warehouse building and two adjacent frame warehouse buildings, situated in Spokane County, State of Washington, and also owned a large quantity of stock and equipment contained in said warehouses.

III.

On or about the 24th day of March, 1953, the said C. E. Brynildson approached plaintiff for the purpose of endeavoring to sell plaintiff a quantity of the aforesaid roofing products to be used for the re-

roofing of the aforesaid warehouse buildings. The said C. E. Brynildson then and there, for the purpose of influencing plaintiff to purchase said products, warranted that said products were safe and could be safely applied by plaintiff's unskilled employees, and plaintiff, acting upon and relying upon said warranty, and also acting upon and relying upon defendant's implied warranty that said products were safe and fit for the purpose for which they were intended, purchased from defendant at said time a quantity of said Battleship roof primer and a quantity of said Battleship roof coating.

IV.

On or about the 8th day of July, 1953, plaintiff's employees were engaged in using some of the aforesaid Battleship roof primer on plaintiff's said warehouse buildings and on said date, while plaintiff and his said employees were using due care, the said Battleship roof primer violently exploded and ignited, setting fire to plaintiff's said warehouse buildings, which said fire substantially destroyed said buildings and the entire quantity of stock and equipment contained in said buildings as aforesaid. [13] That the said explosion of said Battleship roof primer and the fire which substantially destroyed plaintiff's property as aforesaid was proximately caused by negligence and carelessness of the defendant in that the said Battleship roof primer was a highly inflammable and explosive material, and the defendant knew or should have known of that fact and wholly failed, through labeling the

containers of said material or otherwise, to warn plaintiff and plaintiff's employees of the aforesaid explosive and inflammable nature of said material. The aforesaid explosion and fire which destroyed the plaintiff's said property also proximately resulted from the breach by defendant of the aforesaid express and implied warranties that the said Battleship roof primer was safe and could be applied by unskilled workmen, in that the said material was not in fact safe, but highly explosive, inflammable and dangerous, a fact which was then wholly unknown to plaintiff and plaintiff's said employees.

V.

Plaintiff, within a reasonable time following the aforesaid fire, and immediately upon plaintiff becoming aware of the aforesaid dangerous, explosive and inflammable character of the said Battleship roof primer, gave defendant notice in writing of the aforesaid breaches of warranty and of plaintiff's intention to hold defendant liable for plaintiff's damage occasioned thereby.

VI.

Plaintiff's said warehouse buildings, immediately prior to the aforesaid fire, had a reasonable and fair value of \$233,000.00, and immediately following said fire, and by reason of the damage to said buildings in said fire, said buildings had a reasonable and fair value of only \$20,000.00, to plaintiff's damage, through the negligence and breach of war-

ranties by the defendant as aforesaid, in the sum of \$213,000.00. [14]

VII.

The aforesaid stock and equipment owned by plaintiff and the estate of H. N. Segerstrom, Deceased, which was contained in the said buildings at the time of the said fire, had at the time of the said fire a reasonable and fair value of \$148,000.00, and the said stock and equipment were in said fire wholly destroyed and rendered valueless, and plaintiff and the estate of H. N. Segerstrom, Deceased, have thereby suffered damage through the negligence and breach of warranties of the defendant as aforesaid in the further sum of \$148,000.00.

VIII.

That at the time of the aforesaid fire and destruction of plaintiff's warehouse buildings, plaintiff owned and operated large orchard properties and had a large apple crop maturing on said properties, and by reason of the destruction of plaintiff's warehouse and cold storage buildings, plaintiff was faced with the immediate necessity of obtaining cold storage and packing facilities in order to avoid the loss of the said apple crop through inability to process and store same. Plaintiff therefore and in mitigation of plaintiff's damages undertook the immediate reconstruction of the cold storage building destroyed in said fire and acquired the only available warehouse and packing plant facilities sufficiently near plaintiff's properties, and by these steps plaintiff was able to store and pack the apple crop which

was then maturing as aforesaid. In so mitigating his damages, plaintiff, however, did necessarily incur expense in packing and storing said crop beyond that which would have been incurred but for said fire, in the following particulars: [15]

Additional cost of storing 12,000 boxes of apples at Yakima, Washington due to the inadequacy of the facilities available adjacent to plaintiff's properties	\$1,800.00
Transportation and shipping costs of said 12,000 boxes of apples	622.25
Rental value, including rentals actually paid, as to warehouse facilities destroyed which could not be replaced within the necessary time to handle the apple crop then maturing.....	5,000.00
Extra expense incurred transporting crop between East Farms cold storage plant and warehouse facilities acquired subsequently to fire.....	7,500.00

to plaintiff's further damage through the negligence of defendant as aforesaid in the sum of \$15,022.25.

Wherefore, plaintiff prays that he and the Estate of H. N. Segerstrom, Deceased, may have and recover from the defendant the sum of \$376,022.25, together with plaintiff's costs and disbursements herein, and for such other and further relief as may be proper.

CASHATT & WILLIAMS,
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff

Acknowledgment of Service attached. [16]

[Endorsed]: Filed February 16, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED COMPLAINT

Comes now the defendant and for Amended Answer to the Amended Complaint, admits, denies and alleges as follows:

I.

Admits the defendant at all times in the Amended Complaint mentioned, and now is, a corporation organized under the laws of the State of Texas, but denies that this defendant was at all times mentioned and had been prior to the commencement of this action, and is now, doing business in the State of Washington, and denies it is now subject to the jurisdiction of the courts of this state.

Admits that at all times in the Amended Complaint mentioned, defendant, among other things, sold certain roofing materials known as "Battleship roof coating" and "Battleship roofing primer". Admits that at all times in the Amended Complaint mentioned, one C. E. Brynildson was an agent of the defendant to sell the aforesaid products, and denies each and every other allegation, matter and thing alleged in the said paragraph I of the Amended Complaint. [17]

II.

Admits that at all times in the Amended Complaint mentioned the plaintiff, John Norman Segerstrom, was and now is the duly appointed, qualified

and acting Administrator of the Estate of H. N. Segerstrom, deceased; this defendant denies each and every other allegation, matter and thing contained in paragraph II of said Amended Complaint.

III.

Admits that prior to the 24th day of March 1953, said C. E. Brynildson approached plaintiff for the purpose of endeavoring to sell plaintiff a quantity of roofing products to be used for re-roofing the said warehouse buildings, and admits that John Norman Segerstrom did order from the defendant a quantity of Battleship roof primer and a quantity of Battleship Roof coating, and this defendant denies each and every other allegation, matter and thing alleged in paragraph III of said Amended Complaint.

IV.

Admits that on or about the 8th day of July 1953, certain warehouse buildings caught fire, and admits that the containers of material which were shipped to John Norman Segerstrom contained no express warning, and this defendant denies each and every other allegation, matter and thing alleged in paragraph IV of said Amended Complaint.

V.

This defendant admits that it received a letter from the plaintiff making certain claims, and denies each and every other allegation, matter and thing contained in paragraph V of said Amended Complaint. [18]

VI.

Denies all the allegations of paragraph VI and having no information as to the buildings alleged to be destroyed this defendant denies that they had any particular value, as alleged in the Amended Complaint, or otherwise.

VII.

This defendant having no information sufficient to form a belief as to the truth of the allegations of paragraph VII, and that the said stock and equipment had the value as alleged in paragraph VII, or any other value, denies the allegations of paragraph VII.

VIII.

This defendant having no information sufficient to form a belief as to the truth of the allegations of paragraph VIII of the Amended Complaint, or the expense incurred, as alleged in paragraph VIII, or the reasonable value of such expense, if any was incurred, denies the allegations of paragraph VIII, and each and every allegation, matter and thing therein contained.

For a Further, Separate and Affirmative Defense
This Defendant Alleges:

I.

That if there was any negligence on the part of this defendant, the plaintiff and his agents were guilty of negligence proximately contributing to any injuries or damage sustained by the plaintiff.

For a Second Separate Affirmative Defense, This Defendant Alleges:

I.

That the plaintiff was furnished an instruction pamphlet for the use of "Battleship", but did not follow the same and did not communicate the same to the employees who were given the duty of applying the "Battleship" primer.

For a Third Separate Affirmative Defense This Defendant Alleges:

I.

The employees of the defendant in the course of their duty in applying "Battleship" primer, placed the same in open containers over an open fire and caused it to be heated, all within a combustible wooden building, knowing at the time that said action was dangerous and that there was danger of fire, and that this action on their part materially contributed to and was a proximate cause of any fire which damaged the plaintiff's property.

For a Fourth Separate Affirmative Defense This Defendant Alleges:

I.

That the merchandise referred to in the Amended Complaint was sold pursuant to a written contract consisting of an order signed by John N. Segerstrom, which order was on or about the 23rd day of March 1953, accepted by said defendant and such order provided among other things: [20]

"This non-cancellable order is the entire agree-

ment and no conditions or agreements exist not shown on the original copy of order. No verbal statements or agreement shall vary any part of this written agreement, nor shall any be binding on company or buyer. Buyer agrees that Company makes no representations or warranties either express or implied not shown on this order, and that Company is not responsible for resale or application of these products purchased, or for any detriments resulting from or after application. Anyone who applies or supervises the application of these products does so as agent of the Buyer only."

Wherefore defendant prays that plaintiff take nothing and that it have its costs.

PAUL H. GRAVES,
Attorney for Defendant
GRAVES, KIZER & GRAVES,
Of Counsel

/s/ R. E. LOWE,
PAINE, LOWE, COFFIN, ENNIS
& HERMAN, Of Counsel

Acknowledgment of Service attached. [21]

[Endorsed]: Filed March 23, 1954.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

This matter was before the Court for pre-trial conference on March 5, 1954, pursuant to an order

issued under Rule 16 of the Federal Rules of Civil Procedure. Leo N. Cashatt, Jerome Williams and Kermit Rudolf appeared as attorneys for the plaintiff, and Roy E. Lowe and Paul H. Graves appeared as attorneys for the defendant. The following stipulations were had between counsel as to exhibits:

Plaintiff's Exhibits 1 to 11, inclusive—Photographs. The identity and authenticity of the photographs is admitted, but defendant reserved all other objections until the time of trial.

Defendant's Exhibit 12—Order blank. It is stipulated that the document was signed by John N. Segerstrom and that it may be admitted in evidence without objection.

Plaintiff's Exhibit 13—Blank form of order blank. It is stipulated that it may be admitted in evidence without objection, and it is stipulated that in the ordinary course of business of the defendant this form would have been prepared as a carbon copy of Exhibit 12 and left in the possession of the customer. [22]

Plaintiff's Exhibit 14—Instruction book. It is stipulated that Exhibit 14 is the book of instructions referred to in Exhibits 12 and 13, and is the book of instructions furnished by plaintiff to defendant about the same time as the execution of Exhibit 12, and that it may be admitted in evidence without objection.

Plaintiff's Exhibit 15—Booklet. It is stipulated that this is a folder which was supplied to plaintiff by defendant about the time of execution of Ex-

hibit 12. All objections to the admissibility of this exhibit are reserved until the time of trial.

Plaintiff's Exhibit 16—Lease. It is stipulated that this is the lease of the real estate upon which the buildings and machinery referred to in the Complaint were situated at the time of the fire, and that it may be admitted without objection.

The following additional matters were stipulated between counsel:

I.

It Is Stipulated and Agreed by the defendant that this Court has jurisdiction over the parties and over the subject matter of the action.

II.

It Is Stipulated that the product referred to in the Complaint as Battleship Primer is made according to specifications, that it is a uniform product as shipped by defendant, and that all barrels of the Battleship Primer received by plaintiff by virtue of the order, Exhibit 12, were uniform as to contents when shipped by defendant. [23]

III.

It Is Stipulated that plaintiff will furnish to defendant samples of the portion of the Battleship Primer remaining in plaintiff's possession, for testing.

IV.

It Is Stipulated that plaintiff will make available to the defendant's accountant such books and records as plaintiff has concerning the business known

as Segerstrom Fruit Company, and defendant agrees to furnish plaintiff with a copy of its accountant's findings or summary.

Plaintiff's Contentions

Plaintiff's counsel at the conference made a statement of plaintiff's contentions with respect to the manner in which defendant's product caused the destruction of plaintiff's buildings and property, which statement is attached hereto and made a part hereof. In addition, plaintiff makes the following contentions:

I.

The defendant knew or should have known that the product, Battleship Primer, was inherently dangerous and was negligent in that it did not warn plaintiff in some way of the dangerous nature of the product, and that the defendant had under the circumstances a positive duty to warn purchasers, and that the destruction of plaintiff's property proximately resulted from defendant's negligence in this respect. [24]

II.

The defendant was negligent in that the product could not be applied without heating, and that fact was known or should have been known to defendant, and defendant further knew or should have known that such heating would render the material extremely dangerous and subject to explosion or ignition of gases volatilized from the material and that the destruction of plaintiff's property proxi-

mately resulted from defendant's negligence in this respect.

III.

That the sale of the product referred to was in violation of Revised Code of Washington 70.74.300, in that the containers were not labelled "explosive" as required by said statute.

IV.

Plaintiff withdraws his allegations and all claims or contentions as to breach of warranties, express or implied, and is now relying solely on the claim of negligence.

Defendant's Contentions

Defendant makes the following contentions:

I.

Battleship Primer is not inherently dangerous and the defendant neither knew nor could have known that it was inherently dangerous, but it is patently [25] and obviously a petroleum product. It is not an explosive.

II.

The order blank signed by the plaintiff, Exhibits 12 and 13, contains language which bars any reliance by plaintiff upon oral or other representations other than those contained in the said order blank and in the instruction pamphlet, Exhibit 14.

III.

Defendant gave plaintiff written instructions as

to how to use Battleship and if those instructions had been followed no fire would have occurred.

IV.

The employees of the plaintiff exposed the Primer in question to an open fire inside a wooden building, realizing that such action was dangerous, and this being done in the course of their regular employment, the plaintiff assumed the risk and hazard involved and he is responsible for their wanton acts or negligence and cannot recover.

It Is Ordered that all of the above stipulations be and the same are hereby approved, that the contentions of the respective parties as stated herein are not to be conclusive upon either of them, and that this pre-trial order supplements [26] the pleadings in this cause, and if there is any conflict between the order and the pleadings, this order shall govern.

Dated this 1st day of April, 1954.

/s/ SAM M. DRIVER,

United States District Judge

Agreed:

/s/ CASHATT & WILLIAMS,

Attorneys for Plaintiff

/s/ GRAVES, KIZER & GRAVES,

/s/ PAINE, LOWE & COFFIN,

Attorneys for Defendant

[27]

The Court All right, Mr. Williams when you are ready.

Mr. Williams: Well, then, just for clarification of the issues, your Honor, and not absolutely committing ourselves to the matter at this time, subject to possible revision——

The Court: Yes, that is understood.

Mr. Williams: ——we felt that we would like to say that our position as to how this material touched off these buildings is about this:

That this material, this primer, was, in fact, a highly volatile substance, with certain fractions in it substantially the same as gasoline, and volatilizing or subject to volatilizing, that is, gasefying, the surrounding air at temperatures at least as low as 60 degrees Fahrenheit, so that at normal outdoor temperatures, particularly on the day in question when the temperature was 90 or in excess of 90 degrees, this material was volatile, was subject to and was volatilizing, so as to create a condition where any spark, whether from a match or cigarette or what-not, was liable to set the material off and it would cause an explosion or what would amount to an explosion.

In that connection, as to an explosion, the particular conditions here did not cause a violent explosion, but rather what a scientist would call a somewhat slow explosion, or maybe you could call it a flash fire. The material itself would not burn, but the volatilized fractions of it volatilizing into the surrounding air were touched off and caused this flash fire or mild explosion which immediately then destroyed the buildings.

Our position is—I think we made it clear in the

complaint—that the nature of the material was such that it was highly dangerous by reason of this highly volatile nature of these fractions and such that the manufacturer had [28]an absolute duty to warn the purchasers or others liable to come in contact with the material of its inflammable and explosive nature, and that was not done, and that, in fact, it formed something of a trap, as I said before, because the material otherwise was of an inferior quality, so that, contrary to what the manufacturer by the order and the instructions led one to believe, the material could not be applied cold. In other words, it was simply too thick and viscous to permit it to flow at all and it required some heating in order to put it in a condition where it could be applied, and in that sense it formed a trap. Of course, heating, necessarily, a volatile substance makes it volatilize all the more rapidly and further enhanced the dangerous nature of the condition; but that notwithstanding, even if it had not been heated at all, it was liable to do just exactly what happened; that the substance was such that it was volatilizing in the atmosphere at the air temperature at that time even without the heat.

I think that covers it.

The Court: Your theory, then, is, I take it, that this was an inherently dangerous substance that placed a special burden on the manufacturer and seller?

Mr. Williams: The manufacturer, certainly.

The Court: Well, in this case the manufacturer was the seller.

Mr. Williams: That's right.

The Court: I say, the manufacturer, who was in this instance the seller; is that your position?

Mr. Williams: Yes. [29]

[Endorsed]: Filed April 1, 1954.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS

If the court denies defendant's motion for an instructed verdict, and for dismissal, the defendant then requests that the following special instructions be given to the jury: [2061]

Instruction No. 1

You are instructed that the plaintiff has the burden of proving his case, both as to liability and as to damages. This means that the burden rests upon the plaintiff to prove such issues by a fair preponderance of the evidence; that is, by the greater weight or better evidence. [2062]

Instruction No. 2

Before the defendant can be held liable in damages, you must find from a fair preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of plaintiff's injuries. [2063]

Instruction No. 3

Foresight not retrospect is the standard of diligence. It is nearly always easy after an accident has happened to see how it could have been avoided, but negligence is not a matter to be charged after the occurrence. There is always a question of what reasonably prudent men under the same circumstances would, or should, in the exercise of reasonable care, have anticipated.

Instruction No. 4

You are instructed that the foreman and other employees of the plaintiff Segerstrom, when in the performance of their regularly assigned duties, were agents of the plaintiff in performing such acts, and any negligence of them or any of them was negligence of the plaintiff, and if such negligence was a contributing cause of damage to plaintiff's property, then the plaintiff cannot recover. [2065]

Instruction No. 5

You are instructed that the Battleship roofing primer is not an explosive, as that definition is known to the law, and in your deliberations you should not consider it as an explosive. [2066]

Instruction No. 6

In order for the plaintiff to recover against defendant in this case he must show by a preponderance of the evidence that the defendant had knowledge of a danger, not merely a possible danger but a probable danger, that the material would be

handled by the plaintiff in the way it was handled and that damage to plaintiff's property would result, before the plaintiff is entitled to recover. If you find that the defendant could not reasonably anticipate such probable danger, then your verdict should be for the defendant. [2067]

Instruction No. 7

Where an article is not inherently dangerous but becomes dangerous only because of some act of the plaintiff, then the defendant is not liable to the plaintiff for consequences which result therefrom.

Instruction No. 8

If you find from the evidence that the Battleship primer became dangerous in this case only because of being heated in the manner in which it was heated and that the plaintiff had been warned against heating Battleship, then your verdict should be for the defendant. [2069]

Instruction No. 9

If you find from a preponderance of the evidence that the Battleship product sold to the plaintiff was a standard and common commodity, and that there is no inherent danger in the product as manufactured, which the defendant knew or ought to know would probably produce the injury complained of and in the manner in which it was received, when handled by a person of ordinary knowledge and prudence, then your verdict should be for the defendant. [2070]

Instruction No. 10

You are instructed that generally speaking all persons must exercise reasonable care for their own safety. Therefore, if you find from the evidence that there was a danger in placing the Battleship over an open flame in an inclosed room, and that plaintiff's employees in performance of their assigned duties were aware or in the exercise of reasonable care should have been aware of such danger, then the defendant was not required to give warning of the danger. [2071]

Instruction No. 11

A manufacturer is not bound to anticipate that a product will be used other than in the manner intended, and if you find from the evidence that a reasonably prudent person would not, under the circumstances, place the material referred to in the Complaint on an open fire and within a room such as the room described by the plaintiff's witnesses, then you should return a verdict for the defendant.

Instruction No. 12

If you find from the evidence that the defendant over a long period of time had sold the product in question prior to the time of the sale to the plaintiff, and that in their experience no accident had ever happened through customers attempting to heat the same, then the defendant had a right to assume that in their method of instructing their customers it was exercising due care under the circumstances

and that no warning other than instructions given was necessary. [2073]

Instruction No. 13

You are instructed that it was the duty of the plaintiff, John Norman Segerstrom, to read the instruction book furnished him by the defendant and to follow those instructions, and to pass the information on to the employees charged with using the Battleship product. If you find from the evidence that his failure to do this was a contributing cause of the fire and ensuing damage to his property, then your verdict should be for the defendant. [2074]

Instruction No. 14

You are instructed that the measure of damages is that indemnity which will afford adequate compensation to a person for the loss suffered by him as the direct, natural and proximate consequence of the injury he has sustained. [2075]

Instruction No. 15

You are instructed that damages mean compensation for loss suffered or injury sustained. Damages must be based upon something more substantial than guess, assumption or speculation. The plaintiff must prove that loss was suffered or injury was sustained and the amount thereof by a fair preponderance of the evidence. [2076]

Instruction No. 16

If you find for the plaintiff it will be your duty to award him damages and these should be in such amount as to reasonably compensate him for the loss actually sustained.

The evidence of experts as to the value of any property is not binding upon you, but you will judge the weight and force of that evidence by your own general knowledge of the subject of the inquiry.

You will take into consideration the age and condition of the respective buildings, or parts of the building, and the age and condition of machinery and other personal property, as well as other relative evidence, in considering its value.

If you find from the evidence that the plaintiff is entitled to recover for his additional expense incurred in handling his apple crop for the year 1953, you may include in damages only those amounts which he necessarily incurred because of the destruction of his packing plant, warehouse and refrigeration building by fire, and in connection with repairs to any other building, you should consider only such amounts as were reasonably incurred for the purpose of putting them in useable condition until the burned property could be replaced. In that connection, it was the duty of the plaintiff to use reasonable diligence to rebuild the buildings, if he planned on rebuilding them rather than making permanent improvements to other buildings, if you find from the evidence they could have been used temporarily without such permanent improvements. [2077]

Instruction No. 17

You are instructed that if you find that the plaintiff is entitled to recover from the defendant, then in that event, in determining the amount of damage or loss, if any, that plaintiff has sustained with respect to his buildings, you are to find and allow only such sum as you believe from the evidence is the fair and reasonable value of the destroyed portion of each building. In determining such sum, if any, you should consider its cost, age, condition, location, and uses to which it had been put, to the extent that plaintiff will be placed as nearly as possible in the same position, no better or no worse, than he was immediately before the fire. [2078]

Instruction No. 18

You are instructed that if you believe from the evidence that the structures used by plaintiff in his business prior to the fire were in fact separate buildings, although used for a joint or common purpose, you should consider and assess the damages, if any, to each building separately in accordance with the instructions for measuring such damages that have been given you. [2079]

Instruction No. 19

You are instructed that in the event you should find from the evidence that the plaintiff is entitled to recover of the defendant, it will be your duty to determine the amount of damage or loss you may believe from the evidence that the plaintiff has sustained; and in determining such loss, if any, with

respect to plaintiff's personal property, that is, the machinery, tools, equipment, and supplies, you are to find and allow only such sum as you believe from the evidence was the fair cash market value of such property destroyed by fire on July 8, 1953; provided, such article or thing had a market value.

Instruction No. 20

You are instructed that if you find that the plaintiff is entitled to recover of the defendant, then in considering the amount of damages, if any, to be awarded plaintiff, you will take into consideration in addition to the other elements for determining questions that have been given you, the value, if any, that plaintiff placed on any of his property at previous times, if you find that he was called upon to place such value thereon at any time.

Instruction No. 21

You are instructed that if you believe from the evidence that it was reasonably possible for plaintiff to restore his buildings to adequate use in processing his 1953 apple crop, without equipping another building for such purpose, then you should not consider the expenses of equipping such additional building in determining the amount of damages, if any, to be allowed plaintiff. [2082]

Instruction No. 22

The fact that the court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of

this court, either that it believes or does not believe that the plaintiff is entitled to recover damages. Such instructions are given to guide you in the amount of your verdict, if you find that plaintiff is entitled to recover damages against the defendant.

Instruction No. 23

You are instructed that in this case the plaintiff is suing to recover for claimed negligence of the defendant, the basis of the complaint being that the defendant sold to the plaintiff a dangerous product without warning him of the danger. In that connection, there has been certain evidence offered of statements made by the salesman at the time it was purchased and written statements concerning the qualities of the Battleship product. You will pay no attention to either evidence of statements of the witnesses as to the product or to any printed statements representing the product, as the only ground on which the plaintiff is entitled to recover is that, as stated before, the defendant sold a dangerous commodity to plaintiff without warning the plaintiff of the danger. [2084]

[Endorsed]: Filed May 4, 1954.

Instruction No. 24

I instruct you that the Department of Labor and Industries of the State of Washington has authority to promulgate safety rules and regulations designed to protect the workingmen of this state. Pursuant to that authority it has adopted rules, and these

rules were in effect July 8, 1953, which provide (1) that all open tar heating pots must be kept outside of buildings at all times, with certain exceptions that do not apply to the situation before you, (2) that if tar is being applied inside an enclosure (as contrasted with heating inside an enclosure) exhaust fans must be used to supplement the building's ventilation, (3) that while tar is being cooked an attendant must be present at the pot at all times and (4) that there shall be available some means to smother the fire at fired tar pots at all times. I further instruct you that these rules have no direct application to the work being done by the plaintiff's employees July 8, 1953, but that they may be considered by you, together with all other facts and circumstances which have been proven to your satisfaction, as showing a standard of care adopted by competent authority to govern the heating of tar roofing applications. [2085]

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find for the Plaintiff in the sum of \$111,035.00.

/s/ R. O. ALLEN,

Foreman

[2086]

[Endorsed]: Filed May 8, 1954.

In the United States District Court of the Eastern
District of Washington, Northern Division

No. 1149

JOHN NORMAN SEGERSTROM, as Administra-
tor of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas corporation, Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 8th day of May, 1954, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of \$111,035.00.

It Is Ordered and Adjudged that the plaintiff recover of the defendant the sum of \$111,035.00 and his costs of action.

Dated at Spokane, Washington, this 10th day of May, 1954.

/s/ STANLEY D. TAYLOR,

Clerk

[2087]

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR PARTIAL NEW TRIAL

The defendant, Panther Oil & Grease Manufacturing Co., moves the court to set aside the verdict returned in this case and to set aside the judgment against the defendant entered thereon, and to enter judgment for the defendant in accordance with its motion for directed verdict and based upon the same reasons.

Upon the ground:

The court should have granted defendant's motion for directed verdict at the close of all the evidence because the plaintiff's evidence was insufficient in law;

and all of the evidence is insufficient in law to form a basis for a verdict for the plaintiff.

If this motion for judgment is denied and not otherwise, then this defendant moves the court as to herein designated issues of law that a new trial be granted solely on the question of liability of the defendant to the plaintiff and for the following reasons:

1. That the verdict as to liability of defendant is contrary to law.
2. That the verdict as to liability of defendant is contrary to the evidence.
3. That the verdict as to liability of defendant is contrary to the law and the evidence.

4. That the verdict as to liability of defendant is contrary to the weight of the evidence. [2088]

5. There is no substantial evidence that the defendant was guilty of negligence which was a proximate cause of any injury to the plaintiff's property.

6. The evidence shows that the plaintiff was guilty of negligence which materially contributed to the damage to his property.

7. The court erred in denying defendant's motion for directed verdict in its favor at the close of plaintiff's case.

8. The court erred in denying defendant's motion for directed verdict in its favor at the close of all the evidence.

9. The court erred in denying defendant's motion for judgment notwithstanding the verdict.

10. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are instructed that, aside from any requirements of statutes, a manufacturer who puts up and sells a material which is inherently dangerous has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn."

11. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are therefore instructed that if you should

find from a preponderance of the evidence that the material sold by defendant to plaintiff was inherently dangerous, and that defendant failed to warn plaintiff of such danger as to the material, and the fire damage to plaintiff's property proximately resulted from such failure to warn, if any, then your verdict should be for the plaintiff, unless you find further from the preponderance of the evidence that the plaintiff was guilty of contributory negligence."

12. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are instructed that there is a statute of the State of Washington, Revised Code of Washington 70.74.300, which provides as follows: [2089]

" 'A person who puts up for sale or who delivers to a warehouseman, dock, depot or common carrier, a package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word "explosive," shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence."

13. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to the

plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by that statute."

14. The court erred in instructing the jury over defendant's objection and subject to the defendant's exception that it should ignore any reference to the regulations of the Interstate Commerce Commission such regulations as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such material in closed containers.

15. The court erred in instructing the jury over defendant's objection and defendant's exception that it was negligence for the defendant to send out, sell or give material of an inherently dangerous character even aside from the statute, Rem. Rev. Stat. 70.74.300.

16. The court erred in instructing the jury, in substance, over the defendant's objection and defendant's exception, that if the manufacturer does not intend to have his product used in a certain way, this will not relieve him from liability for damages to one attempting to so use it, if the manufacturer as an ordinary prudent person had reason to believe that it would be so used and from directions or instructions or information furnished by the manufacturer, a person of ordinary intelligence would conclude that it might safely be so used.

17. The court erred in receiving in evidence

plaintiff's Exhibits 77, 78, 79 and 80, for the reason that said testimony was not proper rebuttal and there was no showing as to said labels being used on or prior to July 9, 1953.

18. The court erred in refusing to give defendant's requested instruction No. 24, submitting to the jury for its consideration rules of the Department of Labor and Industries regarding the use of open tar heating pots, or otherwise submitting to the jury an instruction on said regulation of the Division of Safety, Department of Labor and Industries and the effect thereof.

May 17, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ By R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ By PAUL H. GRAVES,

Attorneys for Defendant

Acknowledgment of Service attached. [2091]

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

ORDER DENYING POST-TRIAL MOTIONS

This matter came on regularly for hearing before the undersigned Judge of the above-entitled Court on the 20th day of May, 1954, on the motion of plaintiff for a partial new trial on the issue of

damages only, and also upon the motions of the defendant for judgment notwithstanding the verdict of the jury or alternatively for a partial new trial on the issue of liability only, and plaintiff appearing by his attorneys, Cashatt & Williams and Malott, Dellwo and Rudolf, and the defendant appearing by its attorneys, Paine, Lowe & Coffin, Ennis & Herman and Graves, Kizer & Graves, and the Court having heard the arguments of both parties as to all of said motions, and being fully advised in the premises, Now, Therefore,

It Is Ordered that all of said motions be and the same are hereby denied, and the judgment heretofore entered upon the verdict of the jury in this case shall be of full force and effect. Both parties are allowed exceptions.

Approved, Clerk is directed to enter.

Done In Open Court this 14th day of June, 1954.

/s/ SAM M. DRIVER,

District Judge

[2092]

Presented by:

/s/ JEROME WILLIAMS,

Of Counsel for Plaintiff

Approved as to Form:

Paine, Lowe, Coffin, Ennis & Herman,
Graves, Kizer & Graves,

/s/ ALAN P. O'KELLY,

Attorneys for Defendant

[2093]

[Endorsed]: Filed June 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Panther Oil & Grease Manufacturing Co., a Texas Corporation, defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 10, 1954, and filed of record in the above entitled court on said date, and from each and every part thereof.

Dated this 23rd day of June, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

GRAVES, KIZER & GRAVES,

/s/ By ALAN P. O'KELLY,

Attorneys for Defendant [2094]

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND

Know All Men By These Presents:

That we, Panther Oil & Grease Manufacturing Co., a Texas corporation, as principal, and National Surety Corporation, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of

Washington, as surety, are held and firmly bound unto John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, in the just and full sum of \$130,000.00 to be paid to the said John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, his attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally by these presents.

Witness our hands and seals this 18th day of June 1954.

Whereas, lately in a suit pending in the United States District Court for the Eastern District of Washington, Northern Division, between the parties above named, a judgment was rendered against defendant above named and defendant having filed a notice [2095] of appeal to reverse the judgment on appeal to the United States Court of Appeals for the Ninth Circuit;

Now, the Condition of This Obligation Is Such that if the said Panther Oil & Grease Manufacturing Co., a Texas corporation, shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed, or if the judgment is affirmed and satisfy any modifications of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then the

above obligation to be void; else to remain in full force and effect.

[Seal] PANTHER OIL & GREASE MANUFACTURING CO.,

 /s/ By A. M. PATE,
 Exec. Vice President

Attest: /s/ GEO. BILLINGSLEY, Secretary

[Seal] NATIONAL SURETY CORPORATION,

 /s/ By L. W. PILKEY, Attorney-in-Fact

Countersigned: Jones & Mitchell Co., signed by
 L. W. Pilkey.

Approved this 18th day of June, 1954.

 Malott, Dellwo & Rudolph,

 Cashatt & Williams,

 /s/ Jerome Williams, Attorneys for Plaintiff.

Approved this 25th day of June, 1954.

 /s/ SAM M. DRIVER, Judge [2096]

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a Notice of Appeal was filed in the above entitled cause by the defendant on June 23, 1954, and upon oral motion of counsel for the defendant, it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including September 21, 1954.

Dated this 26th day of July, 1954.

/s/ SAM M. DRIVER,

United States District Judge

[Endorsed]: Filed July 28, 1954.

[2097]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

1. The testimony by Mr. McGivern, giving his opinion as to why manufacturer's labeled products, having a flash point of 150° or less is hearsay, speculative, not a subject of expert testimony and not admissible.

2. The respondent was adequately warned that the product furnished him by the appellant should not be heated.

3. The proximate cause of plaintiff's damage was the unanticipated conduct of plaintiff in placing the product over an open flame.

4. The respondent, through his employees, was aware of the danger of heating the product and was, therefore, negligent as a matter of law and assumed the hazards in heating.

5. The construction and application of the Revised Code of Washington, Section 70.74.300 was for the Court to determine and should not have been left to the Jury.

6. The Washington Statute RCW 70.74.300 does not intend to and does not apply to a commercial product such as the roof coating in question.

Dated this 3rd day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,
/s/ R. E. LOWE,
GRAVES, KIZER & GRAVES,
/s/ B. H. KIZER,
Attorneys for the Defendant

Acknowledgment of Service attached. [2098]

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The appellant hereby designates the following portions of the record to be filed in the Court of Appeals:

Amended Complaint.

Petition for Removal.

Bond on Removal.

Amended Answer to Amended Complaint.

Order on Pre-trial Conference.

Reporter's Transcript of Proceedings.

Reporter's Transcript of Proceedings reduced to Narrative Form.

Testimony (except that relating to amount of damage).

Motion for Dismissal or Directed Verdict at the end of Plaintiff's Case.

Motion for Directed Verdict at Conclusion of all Testimony.

Court's Oral Opinion on Motion for Directed Verdict.

Defendant's Requested Instructions.

Transcript of Court's Instructions.

Transcript of Defendant's Exceptions to Instructions.

Verdict.

Judgment.

Defendant's Motion for Judgment Notwithstanding the Verdict or for Partial New Trial.

Opinion on Motion for Judgment n.o.v. [2099]

Order Denying Post-Trial Motions.

Notice of Appeal.

Cost and Supersedeas Bond.

Order Extending Time to File and Docket Record.

This designation of record to be transmitted.

Dated this 3rd day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ B. H. KIZER,

Attorneys for Defendant [2100]

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

In addition to the record heretofore designated to the Clerk of the above entitled court to be transmitted to the Court of Appeals, on appeal of this case, you will please transmit to the Clerk of said court the following exhibits:

Exhibit 12—Order of purchase.

Exhibit 13—Blank form of order.

Exhibit 14—Instruction pamphlet.

Exhibit 18—Instruction pamphlet.

Exhibit 19—Letter from defendant to plaintiff.

Exhibit 25—Specifications of primer.

Exhibit 27—Graph of tests.

Exhibit 46—Printed pamphlet of tar kettle.

Exhibit 49—Chart of temperatures.

Exhibit 50—Chart of temperatures. [2101]

Exhibit 57—Chemical standards of asphalt.

Exhibit 65—Record of sales.

Exhibit 66—Record of sales.

Exhibit 67—Computation of total sales.

Dated this 8th day of September, 1954.

GRAVES, KIZER & GRAVES,
/s/ PAUL H. GRAVES
PAINE, LOWE, COFFIN, ENNIS
& HERMAN,
/s/ R. E. LOWE,
Attorneys for Defendant

Acknowledgment of Service attached. [2102]

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD

Appellee hereby designates the following additional portions of the record to be transmitted to the Clerk of the Court of Appeals for the Ninth Circuit for filing in said Court:

Reporter's entire Question-and-Answer Transcript of Trial Proceedings.

The originals of the following Exhibits: 15, 20, 21, 23, 26, 47, 48.

This Designation.

Dated this 8th day of September, 1954.

CASHATT & WILLIAMS and
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff-Appellee

Acknowledgment of Service attached. [2103]

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION

In addition to the record heretofore designated by both parties to be transmitted to the Court of Appeals for the Ninth Circuit, would you please transmit the originals of all of the exhibits introduced in evidence on the trial of this case.

Dated this 10th day of September, 1954.

CASHATT & WILLIAMS and
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff-Appellee

Acknowledgment of Service attached. [2104]

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals on file in the above entitled cause:

Petition for Removal.

Bond on Removal.

Amended Complaint.

Amended Answer to Amended Complaint.

Order on Pre-Trial Conference.

Reporter's Narrative Form Record of Proceedings.

Reporter's Record of Proceedings (complete form).

Defendant's Requested Instructions.

Verdict.

Judgment on Jury Verdict.

Motion for Judgment Notwithstanding the Verdict or for Partial New Trial.

Order Denying Post-Trial Motions.

Notice of Appeal.

Cost and Supersedeas Bond.

Order (extending time to file and docket record on appeal).

Appellant's Statement of Points on Appeal.

Designation of Record to be Transmitted.

Supplemental Designation of Record to be Transmitted.

Appellee's Designation of Additional Portions of the Record to be Transmitted.

Appellee's Supplemental Designation.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as set forth in the Appellant's Notice of Appeal filed June 23, 1954, and as called for by Appellant's Designation of Record, Supplemental Designation of Record, and Appellee's Designation of Additional Portions of Record and Supplemental Designation.

I further certify that all exhibits introduced and rejected at the trial, being exhibits numbered 1 to 80 inclusive, excepting numbers 29, 41 and 64, which were withdrawn, will be forwarded under separate cover to the Clerk, United States Court of Appeals, Post Office Building, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 15th day of September, A. D. 1954.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, United States District Court, Eastern District of Washington.

In the United States District Court for the Eastern
District of Washington, Northern Division

Civil No. 1149

JOHN NORMAN SEGERSTROM, as Adminis-
trator of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas Corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL
(In Narrative Form)

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, April 26, 1954, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by Jerome Williams and Leo N. Cashatt of Cashatt & Williams, and Kermit M. Rudolf of Malott, Dellwo & Rudolf, his attorneys; the defendant being represented by Roy E. Lowe of Paine, Lowe, Coffin, Ennis & Herman, and Paul H. Graves of Graves, Kizer & Graves, its attorneys;

Whereupon, the following proceedings were had, to-wit: [33]

Spokane, Monday, April 26, 1954, 1:30 p.m.

Prior to the selection of a jury in the instant cause, the following proceedings were had in chambers:

Plaintiff was granted permission by the Court to call Mr. Segerstrom and Mr. Rosenbaum, his foreman, first on the liability phase of the case, and later on damages.

Plaintiff requested a ruling from the Court as to the admissibility of valuations of property contained in inheritance tax returns, advising the Court it was anticipated defendant might seek to introduce them as an admission against interest. The Court ruled the matter would be passed upon when it arose during the course of the trial.

Plaintiff was granted leave to file a trial amendment to the amended complaint alleging additional items of expense in mitigation of damages not to exceed \$15,500.

Upon motion of the defendant, Stipulation II of the Stipulations of Fact was amended to substitute the word "specification" for the word "formula."

In the absence of stipulation to the contrary, the Court ruled the verdict must be unanimous, and it was agreed an alternate juror should be selected. (T-2-12*)

Whereupon, a jury, together with one alternate, [34] was duly impaneled and sworn to try the cause; the Court gave cautionary instructions to the jury; and the cause was adjourned until 10 o'clock a.m., Tuesday, April 27, 1954.

* Refers to original Q. & A. typewritten transcript.

Spokane, Tuesday, April 27, 1954, 10 a.m.

Mr. Williams made an opening statement on behalf of the plaintiff.

JOHN NORMAN SEGERSTROM

plaintiff herein, called and sworn as a witness on his own behalf, testified as follows: (T50-104)

Direct Examination

My name is John Norman Segerstrom; I reside at East Farms, Washington, near the Idaho State line, in Spokane County, where I have lived all my life.

My father, H. N. Segerstrom, died in August, 1949. My sister lives with me and we are in partnership running the business, and my mother also lives with me. My sister is married and her name is Elizabeth Jane Hoskinson.

Our business is the growing of apples on 400 acres of orchard property, which we pack and ship all over the country and abroad.

The packing of applies includes picking from the [35] trees into boxes, bringing them to the warehouse, where they are sent through the packing line, washed clean by a washing machine, graded according to condition and size, individually wrapped in paper, placed in boxes, the lid and label, is put on the box, and they are sent to cold storage or they are shipped out in refrigerator cars.

Our annual production of packed apples varies from 80,000 to 170,000, not including culls which

(Testimony of John Norman Segerstrom.)

are sent to processors, being an additional 30 to 40,000 boxes annually. On an average, our production is the equivalent of 120 refrigerator railroad cars, there being 800 boxes to a car.

Prior to July 8, 1953, we had a warehouse 550 feet long by 50 feet wide situated on the Spokane International Railway tracks at East Farms and in the center of our orchards, where we conducted our packing and cold storage operations. On that date, there was an explosion caused by the formation of gases from this roofing material that substantially burned the plant down, with only the walls and floor left in one section.

The manufacturer of this roofing material is the Panther Oil & Grease Company, the defendant in this action.

(Objection was made to the question: "How did you come to have that roofing material?" on the ground the Court had previously ruled out the issue of express or implied warranty. (T55) [36])

Following a discussion between Court and counsel, in the absence of the jury, the Court ruled the witness might testify as to the conversation with the salesman of the roofing primer as bearing upon the alleged negligence of the defendant in failure to warn plaintiff of the character of the product and as general background to the transaction; that there would be no basis for recovery on the ground of breach of warranty, as the Court would instruct the jury on the elements of proof necessary for recovery; that objection would be sustained to any ques-

(Testimony of John Norman Segerstrom.)

tion clearly calling for an answer tending to show implied or express warranty. (T55-62)

In the presense of the jury, the question, in substance, was repeated, at which time the objection was renewed, was overruled, and the following testimony elicited:)

An elderly gentleman named Mr. Brynildson approached me about re-roofing our cold storage section of our warehouse. I had not met him before. He said he was representing the Panther Oil & Grease Company of Dallas, Texas, and he called his product Battleship Liquid Asbestos Roofing.

Ultimately, I signed an order for 325 gallons of asbestos roof coating and 162 gallons of Battleship primer, because the salesman said I would need the primer to prepare the roof for the final roof coating, and I believe that order is Plaintiff's Exhibit 12 for identification, which I read [37] before signing on probably the date it bears, March 20, 1953. The bottom half of the reverse page of the order was not made out in my presence. I think I signed a blank order blank.

(Upon motion, the witness' statement of signing a blank order form was stricken.) (T65)

Plaintiff's Exhibit 12 admitted. (T66)

I think the salesman left me a copy of the order, but I really don't remember.

(A blank order form supplied plaintiff by defendant was marked Plaintiff's Exhibit 13 for identification.)

Plaintiff's Exhibit 13 admitted. (T67)

(Testimony of John Norman Segerstrom.)

In selling me this material, the salesman told me any amateur could apply the roofing; that it didn't require skilled labor. He did not tell me there was any hazard connected with the use of this material; that it might be subject to explosion or fire, or that there was any danger in using the material inside a building.

The salesman left me Plaintiff's Exhibit 15 for identification when I gave him the order. I looked it over, but there were not any instructions contained in it, only advertising.

(There was an objection on the ground of disclaimer [38] by plaintiff of breach of warranty to the offer of Plaintiff's Exhibit 15, which objection was overruled, it being admitted by the Court for the purpose of showing the statement that unskilled labor could apply the material.) (T68-69)

Plaintiff's Exhibit 15 admitted. (T69)

I observed in Exhibit 15 the statements: "Battle-ship Features—Easily Applied by Unskilled Labor!" and "You Save Muss, Fuss & Worry." The salesman did not mention anything to me about the volatile characteristics of this material.

About a week after I placed the order for the roof coating, I received a letter of thanks and some little pamphlet of instructions from the Panther Company, Plaintiff's Exhibit 14 for identification. This was the only communication from the defendant company between the time I gave the order for the material and the fire on July 8, 1953.

Plaintiff's Exhibit 14 admitted. (T72)

(Testimony of John Norman Segerstrom.)

When I received Plaintiff's Exhibit 14, I observed on its face it said: "Instructions for Applying Battleship Asbestos Roof Coating." There was nothing to indicate it as being instructions relating to the primer. On page 3 thereof I observed the following: "Do Not Heat or Thin Battleship. Do not heat Battleship with an open flame. Do not thin it." [39]

Excerpts from Plaintiff's Exhibit No. 14:

* * * * *

"Please * * *

Read This Page before starting application!

Do Not Heat Or Thin Battleship

Do not heat Battleship with an open flame. Do not thin it. When either is done, the waterproofing qualities of Battleship are damaged. Hence, a proper job is impossible. If, in extremely cold weather, it is necessary to heat Battleship, do so by placing the drum in a warm room 72 hours before the material is to be used."

* * * * *

"Application

(Make Doubly Sure Your Roof Is Absolutely Dry Before Applying Battleship.)

Before applying Battleship Liquid Asbestos Roof Coating, it is recommended that a primer coat of Battleship Primer, in the amount of 1½ gallons to 100 square feet, be applied to composition or felt roofs that are extremely dried out or porous."

* * * * * [40]

(Testimony of John Norman Segerstrom.)

When either is done, the waterproofing qualities of Battleship are damaged."

(Objection was made to the question: "And what, if anything, did you conclude in your own mind upon reading that as to whether there was anything dangerous about heating Battleship?" as calling for a conclusion of the witness and speculative. (T73)

(Following a discussion between Court and counsel, in the absence of the jury, the objection was sustained.) (T74-76)

(The noon recess was taken.)

2 o'clock p.m., Tuesday, April 27, 1954

(The plaintiff, John Norman Segerstrom, resumed his direct testimony as follows:)

I am a graduate of Gonzaga High School and Washington State College, having taken a liberal arts course with the idea of becoming a high school teacher. I have never had training in chemistry or any engineering field. Prior to the explosion and fire involving the warehouse, I knew that gasoline gave off vapors which were subject to explosion or rapid burning, but I did not know that was true as to other petroleum products. [41]

About the first part of April, two or three weeks after I signed the order, the material arrived. Plaintiff's Exhibit 17 for identification looks like an invoice to me, but I don't remember seeing it before and I don't remember handing it to you, Mr. Williams, but I might have.

Rhea Rosenbaum, my foreman, called me and

(Testimony of John Norman Segerstrom.)

said the material had arrived at the warehouse. I told him when the slack season came where we had labor available, to apply the roofing to the roof of the cold storage section, and that in the meantime he should put it out of the way some place.

On July 6th he again called me and said he had labor available to apply the roofing and asked if it was all right to go ahead. At that time he asked me for directions as to how to apply the primer.

(An objection was made to the question: "How did you respond, what did you say to Mr. Rosenbaum, as to any directions about putting the material on?" on the grounds of hearsay, not within the issues and not binding on defendant. (T83)

In a discussion between Court and counsel out of the hearing of the jury, Mr. Williams advised the Court it was his intention to prove Mr. Segerstrom told his foreman there were no directions as to the primer.) (T83-85)

I told Mr. Rosenbaum there were no instructions on [42] applying the primer and to go ahead and put it on.

The next thing I heard the plant had burned down. I was in Spokane at the time and returned home about 2:30 or 3 o'clock in the afternoon. Subsequent to Mr. Rosenbaum's calling me about applying the primer, I did not go over to the plant because I did not have time, so I knew nothing further of the matter until after the destruction of the plant.

Prior to the fire, I thought this roofing primer

(Testimony of John Norman Segerstrom.)

was asbestos. It said "asbestos" on the name. I did not know that it was asphalt or had any petroleum products in it, and was not aware there was any hazard of explosion or fire.

Cross Examination

(T88)

I am 37 years of age and graduated from Washington State in 1941. After graduation, I returned to the ranch and helped my father manage the business. I drove him around as he was an invalid and couldn't drive. During the time I was in school, I worked summers on the ranch and helped operate the place. During the packing season, I was in school. The general work in the operation of the orchards in the summer is mostly irrigating and spraying.

In 1947, after I was out of school, a new warehouse was built, my father looking after most of that. I [43] don't remember whether the roofs on the warehouses and other buildings were patched after I left school in 1941, but they might have been. My father ran the ranch. I helped him, but he was the boss.

I remember my deposition being taken on April 8, 1954, in the offices of my attorneys, and, in response to questions, I answered that I thought my foreman could apply the primer without any instructions; that he had put on lots of roofs; that we repair roofs every year; that I did not actually see him put them on or actually engage in the

(Testimony of John Norman Segerstrom.)

work; that we get a barrel or so of roofing and patch roofs every year.

Some years we did and some years we didn't. I do know that some roofs were patched nearly every year.

I also testified on my deposition that I knew the roof coating had been put on in prior years because we had bought the roofing; that I didn't know whether it was asphalt roofing or the same thing that was put on.

I thought Mr. Rosenbaum knew how to put the roof coating on, which is the reason I didn't give him the instruction book I had received.

(It was stipulated between counsel that Defendant's Exhibit 19 for identification was received by the plaintiff together with Plaintiff's Exhibit 14.)
(T95-96) [44]

Defendant's Exhibit 18 has to do with Battleship Asbestos Roofing Coat; there is nothing about primer there.

Defendant's Exhibit 19 admitted. (T96)

The instruction book I received by mail didn't have anything in red here, as I remember it, though it might have had. As I remember it, it was small, black letters in the middle of the book. To my memory, Defendant's Exhibit 18 is entirely different from the one I received by mail with the invoice, Plaintiff's Exhibit 14.

Defendant's Exhibit 18 admitted. (T97)

At the time I thought just anyone could put on any of the Battleship preparations, because that is what was said in the folder and that is what the

(Testimony of John Norman Segerstrom.)

salesman told me. The folder said any amateur could put it on. I got that belief either from the salesman or the pamphlet.

The pamphlet I received from the company headed in bright colors, "Read These Instructions Carefully" concerned the asbestos roof coating. I don't believe I read the letter Exhibit 19. I didn't even know I had it until my counsel produced it and reminded me of it. I think I told Mr. Rosenbaum there was an instruction booklet, but there wasn't any special instructions about it, but I didn't tell him there was a letter with the instruction booklet.

All the records pertaining to purchases of roof coating in prior years were burned up in the fire. There might be book entries of those if we dug back far enough, but I don't know that we would be able to find them. Mr. Anderson, a certified public accountant, with offices in the old National Bank Building, has been keeping my books for several years. I don't know whether he would have those records or not.

The roof coating said it was asbestos. That is the only name it has got. I have seen asbestos and it is a grey material. I did not look at this roof coating or primer or Battleship plastic or any of the other products to see what they looked like. I thought this material was asbestos in a liquid form. I didn't know what it was. I have seen roof coating that was other than black in color, such as aluminum colored and all different colors roofing.

(Testimony of John Norman Segerstrom.)

I have seen men spreading material on our roof which was black in color, but it said right on the barrels it was asphalt roofing.

I have great faith in Mr. Rosenbaum and I left it up to him to do whatever he felt best in putting on this roofing. He was worked there 15 or 16 years, had general charge of the work, and had applied or supervised the application of roofing on several other occasions. [46]

Excerpt From Defendant's Exhibit No. 19

* * * * *

"There's one thing of importance regarding Battleship Asbestos Roof Coating that we'd like to bring to your attention. It's a product that we believe to be the finest in existence for the repair and maintenance of roofs. We've put all of our chemical knowledge and manufacturing skill into developing its formula and composition. Hence, its quality and capability, to our minds, is beyond question.

"But to get the finest possible results it's necessary to apply it according to our simple, printed instructions. Reasonable care should be exercised in seeing to it that the roof surface is well-cleaned before Battleship is applied—also to see that necessary patching of large cracks and breaks is done before the application. These preliminaries to the application are easy, though extremely important. They are clearly and simply explained in the at-

(Testimony of John Norman Segerstrom.)
tached booklet, 'Instructions for applying Battleship.' Please read it over carefully.

"Also, please see that the recommendations are adhered to when your shipment of Battleship is applied to your roofs. On this basis, we're both happier—you, because your roofs are placed in excellent condition at mighty low cost, and we, because you're happy and pleased with the results obtained through using our product." [47]

* * * * *

RHEA ROSENBAUM

called and sworn as a witness on behalf of the plaintiff, testified as follows: (T105)

Direct Examination

My name is Rhea Rosenbaum; I reside at East Farms, Washington, right among the Segerstrom orchard property, with my family, and have lived there since 1935. I have been employed by the Segerstroms continuously since 1935, but I had worked there previously. Since 1937 I have been the foreman, which involves the work of growing the apples and taking care of the packing plant in the fall, supervising the field men.

Prior to the fire on July 8, 1953, I was very familiar with the large warehouse building, having been in and around it nearly every day in my employment. I think it was around 1946 or '47 that I had some roof coating put on part of this building, and at other times I have done some patching work.

(Testimony of Rhea Rosenbaum.)

I went two years to high school and two years to business college. I have never had any training or experience in the fields of chemistry or engineering, and prior to the fire I had no knowledge that roofing materials might give off gas vapors which were subject to explosion or flash fire.

The first I learned that Mr. Segerstrom had purchased some of the defendant's roof coating was when it [48] arrived by auto freight about the first part of April. I asked Mr. Segerstrom what should be done with it at that time, and he told me to put it in the plant there, which was about the only place we had for storage and was where we were going to use it. He instructed me to put it on later when we had more time. We put the material in the west part of the cold storage part of the plant. I don't believe the cold storage section was under refrigeration at the time, because we shut it off right around the first of April and I believe this came in a little later. It was not under refrigeration from that time until the time of the fire.

As well as I remember, I believe there were three 50 or 55-gallon barrels of the primer and probably four or five of the roof coating. The only label I remember seeing on the roof coating was this Battleship brand, stating it was asbestos roof coating and made by the Panther Company, and the primer had the same label except it said "Primer". I saw no other label or tag or anything of that sort indicating any hazard connected with the material in

(Testimony of Rhea Rosenbaum.)

those barrels, and I examined them carefully at that time.

Two or three days before the fire, I am not sure, but I believe it was Monday, the 6th of July, about 10 or 11 o'clock, I talked to Mr. Segerstrom about applying the roof coating as we had a little time. Then on Tuesday night, which I believe was the 7th, I called him up after I had [49] examined the barrels and was wondering about the procedure of putting it on. I believe that was the day before the fire. At that time I told him we were ready to put this primer on and that I had examined it and it was awfully thick, and I asked him if he had any instructions or if it took any particular know-how to put it on.

It was on Monday that I discovered the material was pretty thick. I had opened up a barrel and I think I took a stick and stirred it and discovered it was awfully thick, and I didn't think it could be put on in that condition. That is the reason I put it out on the porch where it could warm up on Tuesday. I placed the barrels, three barrels of primer and some of the other, out on a loading dock on the south side of the building where it was exposed to the rays of the sun. It was a warm day with the temperature around 90 degrees.

We did not attempt to apply any of the material on Tuesday, but on Wednesday morning we took a barrel of this primer in and took part of a pail out and up on to the roof and tried to spread it, and we found it was just a little too thick, that we

(Testimony of Rhea Rosenbaum.)

couldn't spread it. We brought the barrel into this large room.

Plaintiff's Exhibit 20 for identification is a floor plan of the cold storage section which I helped prepare. The dimensions of the cold storage section are 50 by [50] 325 feet, and the floor plan is drawn pretty close to a scale of one inch equals 10 feet. I think it is a pretty accurate portrayal of the shape of the cold storage section of the building.

Plaintiff's Exhibit 20 admitted. (T119)

The reason I took the primer inside the building before drawing the pail from it was that we were figuring on taking it up through the manhole there. It was more a matter of convenience.

The compressor room is indicated on the floor plan by a small square in which I have written the words "Compressor Room." This room is fully enclosed by concrete walls. This is the center of the floor plan, this half with the two rooms, with the door in the center, the large door in the west end, a door here, and a door there (indicating on Exhibit 20.) On the morning of the fire, July 8th, the large door at the west end of the building was open, as were the two doors in the two partitions or rooms comprising the westerly half of the building.

In the easterly half of the building there was one large opening, and in the extreme east end there is a door on both the north and south sides. The similar marks on the east wall indicate doors that went into the packing room.

The manhole was located directly above this cor-

(Testimony of Rhea Rosenbaum.)

ner [51] of the compressor room, being the northeast corner, where I have written "Manhole," with the permanent ladder right along that side.

Our plan was to use a rope hook on the pail in lifting the material on to the roof through the manhole.

When the material was set outside the day before, it was placed directly in front of the door on the south side of the building directly to the west of the compressor room on the loading dock. We brought one barrel in and set it in the corner where the east wall of the compressor room joins with the south wall of the building. We then drew off the first bucket and took it up on the roof and tried to spread it, but found it was too thick. The material was not as thick at that time as it was the day before when I checked it inside the building, but it was still rather thick. On the morning of July 8th, the temperature was again around 90 degrees.

When I found the material wouldn't spread, I went down and made a stove. I had observed roofing contractors heating roofing material on some kind of a stove and that was the only way I knew to heat it after it didn't warm up enough in the sun. Before doing this, I again examined the barrel as to any instructions, but there were none.

I obtained a 50-gallon drum and I cut a hole in the top about 12 inches by 18 or 24 inches. I guess you would call [52] it the side as I laid the barrel down lengthways so that the side was resting on

(Testimony of Rhea Rosenbaum.)

the ground. I then cut a hole in one end so we could get some wood in and a hole in the opposite end for the smoke to come out. The hole I cut in the top or side of the barrel was where we were figuring on setting these pails.

I think Plaintiff's Exhibit 21 for identification is a fair representation of the stove which I made. The line across the page would represent the floor. The hole in the top was cut large enough to accommodate two pails measuring about 12 inches each, or about 24 inches, I imagine. The smoke hole was pretty round in shape and the one in the other end was more or less round or oblong, probably.

Plaintiff's Exhibit 21 admitted. (T131)

After making the barrel stove, I took it up and put it in this large room and we put a fire in it and after a short time we proceeded to use it to heat this material. We used apple wood in building the first and we let it burn awhile until it burned down and we started to heat the material. By that time the fire was more or less coals. The reason I did that was because I thought it would not be very nice to work where there was flames. I had no idea that the material would have a tendency to give off vapors that would be explosive. I thought it might possibly burn if some of it spilled directly on the fire, but not in such [53] proportions as to endanger the building. I didn't think there was any danger involved in heating the material on this stove.

I have placed on Exhibit 20 a small circle with

(Testimony of Rhea Rosenbaum.)

the figure "1" and my initials "R.R." indicating where the barrel stove was located. With reference to the north and south walls, we tried to place it as near the center as possible and it was 30 or 35 feet east of the west partition. This room had a concrete floor; the walls were pumice block with a wood lining with insulation in between; the ceiling was of wooden construction, 18 feet high; and the roof was a round roof.

We used four pieces of angle iron to support the pails on top of the barrel stove and to stabilize them.

Plaintiff's Exhibit 22 for identification is the type but not one of the actual buckets we were using.

Plaintiff's Exhibit 22 admitted. (T136)

Tom Woods was delegated by me to tend to the fire and heating of the material on the stove, and Roy Torvik and Elwood Rosenbaum, my brother, were going to spread the material on top of the roof. I was not present at all times during that morning but was back and forth. I told Mr. Woods to be a little bit careful and not spill a bucket, something to that effect, in handling this material while being heated [54] on the stove, for the reason I presumed it might burn if it were spilled directly on the fire. I didn't know to what extent it might burn, but I didn't figure it would amount to too much. I believe I mentioned to Mr. Woods not to put any wood in only just when the fire got down low, something to that effect, to keep it to coals as much as possible. Of course, you have to add a

(Testimony of Rhea Rosenbaum.)

little wood once in awhile to keep your fire going.

It must have been about 8:30 or 9 o'clock that we started heating this material. I was back and forth there probably three or four times that morning and no trouble was experienced while I was there. Around 11:30 or 20 minutes to 12, I returned to the building and I told the boys to finish up that barrel of primer and quit for the day as it was getting rather windy. They were nearly through with the barrel. I left a little before noon.

My brother, Elwood, was the only one who had his lunch with him and I believe I suggested he eat his lunch there. I don't believe I gave him any particular instructions as to the pails or the fire in the stove. I did not return then until the fire occurred.

The door at the west end of the building was open during the entire morning, as were the doors on the two inner portions, the door on the south side of the building by the compressor room. I don't remember, but I don't believe the [55] doors on the north side of the building were open.

In placing the stove inside of the room when I decided to heat the material, I didn't think there was the least bit of danger in that large room as I hadn't seen anything on the barrels or had any instructions to that effect, and it was a matter of convenience in taking it up through the manhole, rather than carrying it up over those docks.

I believe Mr. Woods took his finger and dipped it in the material to see when it was warm enough

(Testimony of Rhea Rosenbaum.)

or thin enough to spread. I would say he was leaving the material on the stove about 10 or 15 minutes.

I would say this material smelled a good deal like tar as we were taking it from the barrel. I did not detect any fumes or odor that smelled like gasoline or anything of that sort.

There might have been a few pallets at about the extreme east end of this large room; otherwise, the room was empty. To my knowledge, none of this material was spilled on the floor.

On my way back to the building about 1 o'clock from lunch, I saw the smoke when I was about a half or three-quarters of a mile away. I started over to call the fire department, but was informed they had already been called, so I went back to the building and tried to help the fire department when they came. [56]

When I arrived at the building, I found a fire going and smoke coming out of the roof. It seemed like the whole inside of that large room was burning.

I never had any knowledge or inkling that this primer was subject to giving off any vapors that might explode or cause a flash fire. I never had any experience with such a thing in the past.

After the fire, we had one barrel of primer that was full and another with very little left in it of the three barrels. Apparently, the one had been spilled sometime in the confusion of the fire. Only the empty barrel remained of the one inside the building.

(Testimony of Rhea Rosenbaum.)

We took the full barrel of material down to the headquarters at my house and placed it under a tree when we started cleaning up. I believe it was at your instructions that we did this. Later you told me to place it under cover, and I put it under a machine shed where it has remained until this time. I know there have been samples taken from the barrel from time to time.

Plaintiff's Exhibits 1 to 4, inclusive, for identification represent the burning of the Segerstrom building. I don't know who took the pictures, but they are a fair representation of the building as it was burning.

Plaintiff's Exhibits 1-4, inclusive, admitted.
(T147) [57]

(It was stipulated that Plaintiff's Exhibits 5 to 10, inclusive, were photographs of the remains of the Segerstrom building after the fire.)

Plaintiff's Exhibits 5-10, inclusive, admitted.
(T147)

(It was stipulated that Plaintiff's Exhibit 11 for identification was an aerial photograph of the building taken after the fire.)

Plaintiff's Exhibit 11 admitted. (T148)

The large section with the walls remaining shown in the aerial photograph, Exhibit 11, is the cold storage section, and the foundation of the packing section is shown to the east.

(Testimony of Rhea Rosenbaum.)

Cross Examination (T149)

The fire occurred on Wednesday, July 8th, and it was the day before that we put the barrels out on the loading dock which extended probably nine-tenths of the way along the south side of the building. There were three large doors on the south side of the building, plus a little door in the compressor room. We put the barrels out a little before noon on July 7th, the day before the fire. Prior to that, they had been in the cold storage section. I think the refrigeration had been shut off shortly before the barrels were placed in there. The cold storage section had [58] been under refrigeration and maintained at a temperature of about 32 or 33 degrees all winter prior to its being shut off. Then the doors were kept closed during the balance of the spring and summer pretty much, except when working there.

The walls, ceiling and doors of the cold storage section were insulated with about 8 inches of balsam wool and Zonalite insulation.

On Monday, two days before the fire, I opened a barrel of the primer and took a stick and stirred around and saw that it was awfully thick, so I just presumed that we couldn't pour it out. The opening in the barrel was about two, two and a half inches. I just poked the stick down in.

Then the next day toward noon we moved it out on the loading dock, which had a partial roof some 8 or 9 feet high above the dock extending out to

(Testimony of Rhea Rosenbaum.)

about the same extent as the dock itself. The dock was constructed so that apples could be wheeled across the dock and directly into a freight car, and the roof was there to protect the apples or anything that might be there waiting to be loaded. This was just a small porch over the doorway of about the width of the door, between 5 and 6 feet. The barrels were in the sun in the afternoon. That is the door near the compressor room on the south side of the building. The door on the west end is the widest one, being over 12 feet.

The morning of the fire I went to work sometime [59] after 7. Our working hours are 7 to 4:30. It was probably sometime between 7 and 8 that we got started that morning and moved one of the barrels inside. We put a spigot on the barrel and then laid it on its side. We didn't try to stir it. The spigot was large enough to fit a 2 or 2½ inch hole, and the orifice where the material came out was probably an inch and a quarter or an inch and a half. I found that it had thinned out some since the prior day so that it would run pretty slow through the spigot. In my opinion, it wouldn't have run through the spigot the day before.

(An objection was made to the question: "And if you had known the instructions told you to leave it in a warm place for 72 hours, you would have done that, wouldn't you?" on the grounds of calling for a conclusion of the witness and speculation; overruled.) (T158-159)

"Well, I presume I would."

(Testimony of Rhea Rosenbaum.)

I did draw out a bucket of the material.

Plaintiff's Exhibit 22 is not one of the buckets we were using. As far as I know, the buckets we were actually using were thrown away. I couldn't find any of them. They were similar to Exhibit 22, but I don't know if they had the same type of bottom fastening, nor do I know what Exhibit 22 contained when it was received. We had quite a few of those around which had contained insecticides originally, and we [60] needed many pails for use in spraying so we had picked up pails here and there.

I had also set out two or three barrels of the roof coating on the loading dock outside of the door.

I went up and watched the men try to spread the material on the roof. I am a working foreman, I do repair work, but I am not supposed to do too much work. We were using new brushes that Mr. Segerstrom had purchased. I concluded it was still too stiff to spread.

It did not occur to me to let it sit out in the sun to thin, because, being 90 degrees, I presumed that it should have warmed up enough to spread it. It wasn't 90 degrees the night before. I had had no trouble in spreading primer before was what I was going by. I don't know what the temperature was the night before. We didn't open the bungs or test the material in but the one barrel.

After building the barrel stove, we made a frame around under the barrel with brick to keep it solid.

(Testimony of Rhea Rosenbaum.)

We obtained the apple wood from a supply we keep sawed up on the place at all times for use as fire wood and some of which we sell. We did not choose any particular size, but it was the right length because we had used it for heating the building in the packing season. It would probably average 28 to 32 inches in length and 3 to 6 or 7 inches in diameter, with a very few smaller pieces. We had to use a little [61] kindling to start the fire.

After the fire was built, we waited until it burned down. I started the fire myself, while Mr. Woods put the pails on the fire. I stayed there for the start of the operation and then I had men working other places, I was gone part of the time. I don't recall that I added more wood to the fire that morning, but there was probably some added because it wouldn't burn a half a day. I think I saw some added a time or two as the fire would go down. The last time I was there, between 11:30 and a quarter to 12, everything seemed to be going all right as far as I could tell.

The only odor I noticed from the material was the tar smell. I never noticed any petroleum smell in drawing it out of the barrel or later. I did not know the material would be dangerous if exposed to a flame. I hadn't thought much about it.

My deposition was taken on the 7th of January in the offices of Cashatt & Williams when I was asked various questions and testified I presumed the material might be dangerous if exposed to a flame, but I had in mind if it came directly in

(Testimony of Rhea Rosenbaum.)

contact with the flames. I answered "Yes" to the question my common sense would tell me that, but I was thinking in terms of it might burn if it came in contact with the fire. In reply to a question as to whether I [62] distinguished any odor as to this primer we were using, I answered that it just smelled like tar or probably a petroleum smell, which was true at the time and is true yet. In response to the question: "It had the smell of petroleum?" I answered, "Yes, I guess that is it." To the question: "When you said 'tar,' you were referring to pine tar?" I replied, "Yes, black stuff." To the question: "If you know pine tar, that is very similar to that which is used for roofing, but asphalt also is frequently used for roofing. Which one did you mean when you said 'tar?'" I answered, "I meant asphalt."

I did not know what asphalt was at the time; I am not familiar with roofing; I have heard them talk about tar roofing. I presume I knew what a petroleum smell was, and I knew that petroleum was inflammable and dangerous to have around fire in one sense of the word, that when you talk about petroleum, I think about gas or something. I imagine there are several products of petroleum. I automatically think of gas when petroleum is referred to. I did not know that petroleum gives off a gas. There is a smell to it, and I guess that is the smell I smelled the morning of July 8th when I put this stuff on the fire, I don't just remember.

If I had been given an instruction book which

(Testimony of Rhea Rosenbaum.)

said: "Do Not Heat or Thin Battleship," I wouldn't have done that, as I usually obey orders. [63]

After the fire, there was one barrel we had had inside the building drawing the primer from that was practically empty before the fire started and the other two were still out on the platform, one of which had been turned over and the other one we salvaged was still sitting there. Altogether there were two barrels of primer on the platform and I believe two or three of the roof coating. The barrels of roof coating were turned over and the contents spilled. I don't know how the bungs or plugs got out of the opening of these barrels. I think the primer and the roof coating were in pretty much the same type of barrels. One barrel of primer was also spilled, but the barrel itself was pretty much intact. It looked as though the stuff had apparently spilled out through the bung of the barrel. I don't know whether the bung had been removed, but it wasn't there after the fire.

The barrel of primer that we saved seemed to be sitting out in front where they applied more water. I presume that is the reason it wasn't turned over. The bung was still in it, but I don't know if it was still in tight. I hauled it down to the place but I didn't open it.

During the fire there was a large amount of water poured on this warehouse and on this loading dock and, I presume, on the barrels of primer, although I wasn't watching them. We had our own

(Testimony of Rhea Rosenbaum.)

fire hose at the plant but it wasn't [64] used at the fire.

I couldn't recall the date but it was soon after the fire that I removed this barrel from the platform and took it out to my place at Mr. Williams' suggestion.

(Mr. Williams advised counsel it was the following Monday, five days later.)

Mr. Cashatt and Mr. Williams had been out in the meantime with some other gentleman a day or two after the fire. I don't know as I was with them, but I think they looked at the barrels of roofing material. They talked to me something about it.

To my memory, there was no water spilled on top of this barrel that remained intact that hadn't been spilled. With the rim around the top, if water from the fire had landed on top of the barrel and the bung had been open or loose, it could have run into the barrel. I didn't pay too much attention to it as I was pretty excited over the deal. If there is any water in the primer now, I don't know how it got there.

To my knowledge, the first samples taken from this barrel was sometime last fall by a gentleman with Mr. Williams and Mr. Cashatt whom I didn't know. I saw him only at a distance. The next samples I know that were taken was early this spring. I believe I met Mr. McGivern from Gonzaga when he took samples, but I couldn't say for sure. [65] That was sometime later in the winter.

If, at the time Mr. McGivern came out to take

(Testimony of Rhea Rosenbaum.)

his samples late last winter or early this spring, the barrel was only three-fourths full, I don't know what became of the balance of the contents. The barrel had been under a machine shed at ranch headquarters since the time it was removed from the loading dock.

The fire hose we had was located at the east end of this room. We had a fire extinguisher in the compressor room and another two or three were in the packing room.

As Mr. Segerstrom testified, I have had something to do with putting on roof coating and doing patch work from time to time on these warehouses on the Segerstrom place. To my recollection, in '46 and '47 we used similar material, put on a primer first and then the heavy coat later. In the meantime, I have had the men patch leaks here and there. I remember one of the men who did this was a man by the name of Bennett, who isn't working for us now, and another by the name of Kato, a Japanese boy we had working there. I was around at the time and showed them how to do it. I presume it was asphalt patching material, but I don't even know the name of it. The material had been on the place for sometime. It was black and had pretty much the same odor. It was thin enough to apply without putting it over a fire. We kept it, I believe, probably, in the basement of this building before [66] it was applied, which is not refrigerated.

(Testimony of Rhea Rosenbaum.)

We didn't open either of the barrels of the roof coating as we hadn't gotten to that yet.

I had observed the heating apparatus used by roofing contractors only at a distance driving along, but I never went up and checked them to see how they were arranged.

I think I told Mr. Woods to be careful with this stuff over the fire and around the fire, because I thought it might burn if it was to come in contact with the fire. It never entered my mind that there was any danger in putting petroleum over an open, hot fire. I believe Mr. Woods was carrying the material up in a pail and pouring it into these other containers on top. He was more or less keeping the edges of the pails cleaned off the best he could by using a stick and scraping it off and then we had a sack or two he would rub it off. I didn't tell him to do that, but I thought it was all right for him to keep it clean, as it might catch fire because of the heat coming up the side of the pail.

I am not too familiar with what a hip roof is, but I would call the roof on the building a rounded, arched roof.

I stated on direct I thought there was no danger of building a fire in this large room and putting this stuff over the fire. I think this room would be large enough for [67] that purpose. I thought there would probably be danger involved in a room with a 7 or 8 foot ceiling. I don't think a person would want to do it in a small room; I wouldn't want to do it in the kitchen of my house. I don't know as

(Testimony of Rhea Rosenbaum.)

I thought much about what would happen in that event. I just thought this big room was kind of like outdoors, this large room. I didn't think there would have been an explosion in a room the size of a kitchen. I thought if the room was large enough, it was reasonably safe. I presume a living room or kitchen or something would be unsafe, because you would be close to the walls and probably have a floor in it, and so on.

I didn't think at the time it was dangerous to cook petroleum over a hot fire. I knew something radically went wrong after the fire started.

A wind came up the day of the fire about 10:30, 11 o'clock after being more or less quiet in the morning. It was from the southwest. The door on the west end of the building was open. It must be around 12 feet wide and probably 10 feet high.

(It was agreed between counsel that the door on the west end of the building would be measured.)

The two inside doors of the refrigerated building were also open. Those are the ones between the two sections and they are pretty near as large as that other one, maybe [68] within a foot. The object you have indicated in Exhibit 8, I would say that is the north door from the outside. I can't see anything in the photographs indicating the partition in the building.

Redirect Examination (T191)

When I said that when I thought of petroleum, I thought of gas, I guess I meant gasoline, not a

(Testimony of Rhea Rosenbaum.)

vapor like heating gas or cooking gas. I was just using a common abbreviation for gasoline when I said "gas." I never gave it any thought, I never thought petroleum gave off any gas vapors which might be subject to explosion, before the fire.

The barrel that I moved over still has a label on saying "Primer," but I think it is pretty well faded or weathered. I doubt if you can read that. I am definitely sure that is the barrel of primer.

In my deposition which was partially quoted, I also testified that I didn't know what asphalt was made from, as well as I remember; that I knew it was inflammable if a flame got in the top of it; that that was the reason we let the flames go out; that in heating this material over those coals, I never thought there was any danger at all; that I had observed contractors using kind of a stove in heating their material in the roofing business and that that is what gave me the idea. [69]

(An objection was made to the question: "And as of that time, before this fire occurred, in your thinking that the material, if a flame got on top of it, that it might cause the material to burn, a fire of what proportions did you think might result?" on the ground of its being entirely too speculative; overruled.) (T193-194)

About all I ever thought about it, might be a little blaze that could be rubbed out, or something to that effect, probably just a little blaze, never thought there was a bit of danger.

(Testimony of Rhea Rosenbaum.)

In heating this material in a small room like a kitchen or living room, I thought the flame might be too close to the low ceiling; not that there would be any danger of an explosion. Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did.

(Witness excused and cause adjourned to 10 o'clock a.m., Wednesday, April 28, 1954.)

Spokane, Wash., Wed., April 28, 1954, 10 a.m.

A discussion was had between Court and Counsel pertaining to plaintiff's theory of measure of damages out of the presence of the jury. (T196-203)

Plaintiff's Exhibit 19 was read to the jury (T204) [70]

It was stipulated between counsel that Plaintiff's Exhibits 23 and 24 for identification were standard labels for Battleship Primer and Battleship Asbestos Roof Coating and would be attached to the said materials in the regular course of business. (T206)

Plaintiff's Exhibits 23 & 24 admitted. (T206)

TOM WOODS

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T207)

I live at East Farms, Washington, right near the packing house that burned, where I have lived about

(Testimony of Tom Woods.)

four years. I am employed by Mr. Segerstrom and was so employed on July 8, 1953.

I remember the day of the fire and I was right there when it happened taking care of the roofing. When I came to work that morning, I understood we were going to put the roofing on. I saw the barrel over in the south corner by the compressor room, the one we hoisted up on a platform so we could draw from it. I couldn't be positive if there was any other barrels in the room. I couldn't swear if that was the primer or the asbestos roof coating.

I recall drawing the first bucket from that barrel. We had to heat it, so after we got the fire going [71] and got the coals, we put it on where we was going to heat it.

Before we started to heat it, we tried to spread the first bucket on the roof. They called me up there afterwards and said it was too thick, they had to reduce it down, heat it. It would hardly run out of the drum, out of the spigot. That first bucket wouldn't hardly pour on the roof at all.

Rhea Rosenbaum decided it was to be heated, said we had to thin it down. He went and cut a big drum out, one of these big barrels, oval-shape, and then we had cross pieces across here, four, I believe, about that wide, two feet and something, anyway. The barrel stove was then placed about 20 feet from the south side and about 15 or 20 feet from where we hoisted it up.

The small room at the south side of the building is the compressor room shown on Exhibit 20. We

(Testimony of Tom Woods.)

had the stove where the mark "No. 1" and the initials "R.R." appear on Exhibit 20. The ladder up to the manhole was 15 or 20 feet away from the stove. The barrel of roofing material was back from the compressor room south, about over next to the wall, in the position indicated by the initials next to the little circle "T.W."

There was nothing in the room we were heating the material in except possibly a few pallets at the east end.

When Mr. Rosenbaum brought this barrel stove back, [72] we fixed it all up and blocked it up good and put our four irons on it across the stove and put our buckets on there. First, we built a fire of apple tree wood and let it burn down to coals. I put two buckets at a time on the stove and one bucket was put on so it would heat faster than the other. I think it was about 9 or 9:30 before we got started heating the material.

I would let the material get so that it was thin enough to pour, I would say a little better than lukewarm, and lots of times I would test it by sticking my finger in the material. It never got so hot that I couldn't stick my finger in it. I would leave the buckets on about 10 or 15 minutes. I don't think any of them was on over 15 minutes. When I tested with my finger, it was to see whether it was thin enough and whether it was getting too hot.

When I decided the material was thin enough, I would climb up the ladder and pull the bucket up with a rope with a hook attached to the bail of the

(Testimony of Tom Woods.)

bucket. Then I would empty the tar in the other two buckets on the roof and go back after another one. Elwood Rosenbaum and Roy Torvik were working on the roof and I would divide my bucket into their two buckets.

I never got the buckets over two-thirds full when I put them on the stove, half to two-thirds. I had never a blazing fire while I was heating this material, just the [73] coals is all there was. After you build a big fire with apple tree wood, they are pretty nice big coals. I was around that stove all morning until noon. I couldn't say how many buckets I heated on the stove, but the barrel I was drawing from was getting pretty well empty by noon, probably a third full, maybe not that much.

I never had any trouble all morning, never spilled any of the material on the floor, and I didn't add any wood during the morning. We had a big bunch of coals when we started and only worked two or three hours. It was after noon that the wind came up.

At noontime, I went home for dinner and Rhea's brother stayed at the warehouse. I got back about 12:30. Before leaving for lunch, I took the buckets off the stove and put them back away from the stove, and when I returned, there weren't any buckets on the stove.

After I came back from lunch, Mr. Rosenbaum said we would just put a few buckets on; that the wind was getting so bad we would have to quit on top of the roof. At this time there was no material

(Testimony of Tom Woods.)

spilled on the floor or any place, it was the same way I had left it.

Then the other two fellows went back up on the roof and I put two buckets of tar on the stove, set one on so it would heat faster and set the other over to one side. There was more heat under the center portion of the stove. [74] Then about a quarter to one or ten minutes to one I took one bucket up to the roof and emptied it, the same as I always did, and went back down after another one. At that time there was one bucket on the stove and there was no fire or flames in the stove. There was no wood in it at all, just coals. I tested that bucket on the stove and set it over so it would heat faster and turned around and started to get another bucket. It wasn't quite thin enough or hot enough yet. I tested it with my finger and it was getting warm, all right, but by the time I got another bucket, it would be about right to take up there then.

Then I started over to the barrel to get another bucket, I had my back turned to the stove, and there was just a big "whoosh" and I looked around and there was fire on the ceiling. I don't think I could make a sound as loud as it was. It was just like a great big "whoosh," just like that, I had never heard any sound like it before. When I looked back, everything was on fire, the whole ceiling inside of the room. The time I looked back, there was no fire on the stove, but just about three seconds later she is coming right back down on the floor from that round roof, in just a few seconds. When I first

(Testimony of Tom Woods.)

looked around, I did not see any fire coming off the bucket or on the stove or on the floor. The first thing I saw was the whole north side of the ceiling was all in flames, coming over that oval-shaped [75] roof right back billowing down.

The noise I heard was quite a noise. I was just about halfway between the stove and the barrel when it happened. I don't know if I felt any rush of air because I was so doggoned frightened. I just heard the noise and looked around and there it was. Then I went up the ladder and warned the boys on the roof. I don't think anybody could fly any faster than I went. They were working on the west end of the building. I hollered to them, "She's on fire," and they came over and they couldn't come down the place I went down. I went right back down the ladder and by that time the fire was all over the building. I went through the compressor room and went out the door to the south. There were three doors open, including the big door to the west, but I had no choice.

I have had about an eighth grade education. I don't believe I have any special knowledge, training or experience with oils or petroleum or asphalt. I wouldn't have been around there if I knew this material that I was heating over this stove might be giving off gas vapors. The stuff I was heating smelled like tar and it was kind of black in color, I guess. I don't know what you would call it, kind of dark, anyway. I never noticed for any label of warning on the barrel because Mr. Rosenbaum al-

(Testimony of Tom Woods.)

ways looked for that. I did not, myself, consider there was any danger about what [76] I was doing.

Cross Examination (T239)

The material we were working with smelled like roofing tar. The fire was built up at noon by Mr. Rosenbaum's brother. I wasn't there when he built it up. When I returned from lunch, I immediately put two pails on to heat. There were good hot coals in the stove, a little hotter than when I went to lunch, but it wasn't any too hot.

When I testified on deposition last January in Mr. Cashatt's office, I did not say, "Rosenbaum's brother watched the fire and built a good fire while we was gone;" I said he watched the fire. I never said he built a big fire. I was in Room 1121 Paulsen Building on the 7th day of January, 1954, but I believe that you got it wrong, I never said about building a fire. I don't know whether he built a fire or not. How did I know that he built a fire?

Not as I know of, I was not asked the question: "He built a pretty good fire that would last while, did he?" He probably did build a fire. I remember I was asked: "And it would last most of the afternoon?" and answered: "Yes, two and a half hours, probably."

I believe you did ask the question: "He built a pretty good fire that would last awhile, did he?" and I answered: "Yes, it was a good bunch of coals there." [77]

Maybe I did answer: "Yes, Rosenbaum's brother

(Testimony of Tom Woods.)

watched the fire and built a good fire while we was gone," and I remember I continued my answer: "We had enough so we had some coals after dinner." That is the way it was. I will say yes, then, he built the fire. I wasn't there.

I discussed my testimony with Mr. Williams that one time last January and only just talked a few minutes with him since. I haven't exactly talked with him about this particular testimony.

I put my finger in the top of the material to test it while it was being heated. I didn't stir it up from the bottom, but I felt of the bucket. Mr. Rosenbaum had told me to be careful with it and not let it get too hot. I never thought it would be dangerous, not unless you got it too hot or if you got it on the fire, it would be. I knew how hot it was on the bottom because I felt the bottom of the pail with my hand, the side of the pail.

On my deposition, I believe you asked me: "Might catch fire if it got too hot?" and I answered, "Yes." Anything will catch afire if it gets too hot, you know. I also answered: "Well, I have handled a lot of stuff like that myself, and he told me, he said, 'Be careful,' so I was." I don't remember if I answered that he told me not to have any blaze. Mr. Rosenbaum did tell me not to let it get too hot and I so testified on my deposition. Before that I had not [78] talked to anyone about what I was going to say.

When the fire started, I had already been upstairs with one pail and there was only one pail on

(Testimony of Tom Woods.)

the stove at that time. When I came down with the empty pail, I tested the tar roofing before I went over to the drum to fill the bucket by putting my finger in it and feeling of the side with my hand. It wasn't too hot but was plenty warm enough so I pulled it over to one side of the stove and went over to fill the pail. While my back was turned, this happened.

The only odor I could smell was just the tar smell while it was heating on the stove. By tar smell, I mean the kind of tar that is put on roofs. I had never done this kind of work before; I had watched it done as I went by.

After I came down the ladder, I didn't close any doors. I went out of the building through the compressor room. I couldn't get out any other way without making a new door.

There was no wood laying beside the stove. I saw the wood being put in in the morning; I wasn't there at noon. I didn't notice every stick of wood that was put on. I would imagine it was three or four inches through. We had two or three sticks on hand to put in the stove. I just got through telling you, sir, in the morning we built our fire and we never built no more fire until noon, no buckets on the stove. We didn't add any wood during the morning. If there was [79] enough coals at noon, we wouldn't build no more fire, if there was enough of coals left over. I didn't get more wood at noon.

ELWOOD ROSENBAUM

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T265—Vol. II)

I am Rhea Rosenbaum's brother, I live at Otis Orchards, and am employed by the Segerstrom Fruit Company, the Segerstrom family, and was so employed on July 8th of last year.

Just before the fire occurred, I was on the roof of the building as a member of a crew engaged in doing some roofing. The other members of the crew were Roy Torvik, Tom Woods, and Rhea Rosenbaum was supervising. When this happened about between 12:30 and 1 o'clock, Roy Torvik and I were on the west end of the roof. I imagine we had started that morning about 10 o'clock. I never kept track of how many buckets we applied. About the time this happened, the wind was blowing rather strong from the west.

We quit work at 12 for half an hour and I stayed in the building and ate my lunch and kind of watched the pot there, and the other fellows went home. There was just [80] coals in the stove at that time. I didn't add any wood at noon and, as far as I know, none was added.

When we first started that morning, I was up on the roof cleaning up and I didn't see the barrel the material was coming out of. I saw a barrel that they had propped up, but I never paid much attention to it. There was a bucket that was brought up

(Testimony of Elwood Rosenbaum.)

to be applied without heating. We tried to put it on but didn't have very good luck with it because it was too thick. I didn't watch them while they were heating the material, but I knew they were doing it.

I added no wood at noon and there was just coals in the stove when I went back up on the roof at 12:30. During the lunch period there were no buckets on the stove, and I don't know if there were any on when I went back up on the roof.

I would say Mr. Woods brought about one bucket up after lunch some 5 or 10 minutes after we got back up there. The next thing that happened was Mr. Woods hollered it was on fire. He just stuck his head out of the manhole and hollered "Fire" and disappeared. I didn't feel anything or hear anything at the time. Then I tried to go down through the manhole, but the smoke and the heat was so great we couldn't get down through, so we went to the east end and got down by jumping down on the roof of the packing plant and going down a ladder from there. I then came back to the room where the [81] heating was being done, but you couldn't get in there because of the smoke. I saw a few flames but not very many. I never went in the room but just looked in from outside.

When Mr. Woods stuck his head up and hollered "Fire," I never noticed any smoke then, but there was smoke coming through the manhole by the time we got over there.

(Testimony of Elwood Rosenbaum.)

Cross Examination (T275)

There were two manholes, one in the ceiling of the cold storage section and another one in the roof. To get up the roof, you climbed first through the hole in the ceiling then used the ladder to go on up to the roof.

After lunch, it was just a short time, probably 5 or 10 minutes, until Mr. Woods brought up a fresh pail. If I remember right, I think we had a little bit left we were using in the meantime. We each had a pail and he would divide the bucket between the two pails. He never took down the pails we had been using.

I don't know who built up the fire at noon. I was in the room where the stove was all the time while eating lunch. Mr. Woods and Torvik came back together and then Torvik and I went back up on the roof. I didn't see anyone else in the room with Woods at that time. If the fire was built up, I don't know who built it.

The stuff we were working with just had a tar [82] smell, is all I could tell you, but I didn't notice it at all.

I don't remember just distinctly whether we kept rags to wipe the pails off with from time to time. I think on my deposition last January I did say I had a rag to keep wiping the stuff off the edge of the pail. It dribbled over the side a little bit in putting the brush in and taking it out. We never poured any of the material on the roof and then

(Testimony of Elwood Rosenbaum.)

spread it, but dipped the brush in the pail and then spread the roofing.

Redirect Examination (T280)

I really wouldn't know how long it was after Mr. Woods brought the pail up after lunch until he came up and hollered "Fire."

ROY TORVIK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T281)

I live at East Farms, Washington, am employed by Mr. Segerstrom, and was a member of a roofing crew putting material on the roof of the Segerstrom building when it burned down last July 8th. I was with Mr. Rosenbaum on the roof applying the material. I heard him testify and my story would be about the same as his. [83]

Before any of the material was heated that morning, we tried to put it on, but it was too thick. I couldn't say how many buckets we put on that morning. I started working at 7 cleaning the roof before we started putting the tar on.

At noon, I went home to lunch and returned around 12:30. I was a little bit late. I went through the building where the stove was and back up on the roof. I didn't notice whether there were any buckets on the stove at that time, but I didn't see

(Testimony of Roy Torvik.)

anything wrong then. After lunch, I think Mr. Woods brought one bucket up on the roof in about maybe 10 or 15 minutes after we got up there. Then the next thing that happened Mr. Woods stuck his head up and hollered "Fire" and jumped right down. It was a couple or three minutes after he brought the bucket up that he came back and yelled "Fire." We were working on the west end of the building and we then tried to get down. We headed for the manhole on the run, but there was too much smoke and heat coming out. I didn't see no flames at that time. I don't think I saw any smoke when he hollered at us from the manhole. We just took a quick look down the manhole and then run to the east end and jumped on the old building and then down the ladder. I didn't look in the room where the stove was, but looked in another room where there was a lift truck sitting. I thought maybe I could get it out, but there was too much smoke. [84]

Cross Examination (T286)

I went by the manhole in the roof, stood long enough to see the smoke was too thick and then went on over to the east end of the building and jumped down on the roof of the other building. I guess there were three buildings there. I jumped off the roof of the west building onto the roof of the adjoining building in the middle, and there was a ladder on the north side of that building to get down on the road there. Then I went around and closed the big door in the west end of the building,

(Testimony of Roy Torvik.)

and I couldn't see any fire there. I looked inside and the building was full of smoke. I don't remember if I closed any other door or not because I was a little bit excited.

I didn't help build the barrel stove, but I helped them set it up. It was big enough so you could put two pails side by side on at a time for heating.

I didn't have anything to do with moving the roofing material out of the warehouse the day before or back into the building the next morning, and I don't know who did it. [85]

IRA HOSKINSON

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T290)

I am the husband of Mr. Segerstrom's sister, and I reside at the Segerstrom home. I work around the orchards there and was so engaged on last July 8th when this building burned down.

Immediately prior to the fire, I was driving east directly toward the warehouse, the west end. From the road I was on, you can drive directly into the warehouse. There is a jog that goes around the side of the warehouse, jog north and then back east. Driving east along that road, you can see the warehouse for over a mile. You are looking straight at the west door.

I came out of one orchard and I made a turn, going east about a mile away from the warehouse, and I was within a quarter of a mile or less and I

(Testimony of Ira Hoskinson.)

saw a huge flash inside the building through this doorway. I also at that time saw two men on the west end of the roof. I was very curious, I didn't know what was going on. I parked at the end of the west door and ran inside and saw this huge room was just enveloped in flames, ceiling and walls, and it was just a whirling flame, the cold storage section. [86]

I saw Mr. Woods to my right next to the ladder, between the ladder and the door out through the compressor room, and he says, "She blew up, she blew up." I had already seen the fire and I said to him, "Tom, let's get out of here."

I ran out back through the west door to call the fire department. I ran into one of my irrigators out there and sent him to the post office, about a quarter of a mile on east.

I don't know how Tom got out of the building. I never saw him again until he was on the south side of the building.

Before I saw the huge flash, I hadn't seen a thing, just the open doorway. It just lit up in a crimson, fiery, orange color. I then proceeded directly up there, parked and went right in. At that time, the big room was completely enveloped in flames, the ceiling, and churning down both side walls.

Cross Examination (T294)

I saw Roy Torvik close to the west door and we went back into the plant to try to save the lift trucks in the middle room, but we couldn't get near them. When Torvik closed the west door, I was

(Testimony of Ira Hoskinson.)

directing cars on down the road so they wouldn't block the fire wagons. Before [87] that, I had seen him on the roof, and then I was back inside the building with him before he closed the west door. I was about 30 feet away from him when he closed the door, west of the building, and I couldn't see any flames at that time.

I did not oversee the cleaning up after the fire, had nothing to do with it, and I don't know about the other barrel that had been sitting out on the platform.

Redirect Examination (T297)

Shortly after I got to the building, there was a terrifically black smoke built up on the north side. When I first went in, there was very little smoke, the building was just churning, black smoke and fire. I saw the fire when I got into the interior of the room. When I tried to get the lift trucks out, it was eating into the middle room then and the smoke was terrific, blinding.

When I arrived at the building, the door to the west was open and the doors to the next two rooms were open, so you could see completely through.

(The noon recess was taken.)

2:00 o'clock p.m., Wednesday, April 28, 1954

After a conference at the bench between Court and counsel, Mr. Williams read the following stipulation to the jury: [88]

"It is stipulated that the product referred to in the complaint as 'Battleship Primer' is made ac-

ording to specifications; that it is a uniform product as shipped by the defendant; and that all barrels of Battleship Primer received by plaintiff, by virtue of the order, Exhibit 12, were uniform as to contents when shipped by defendant."

It was stipulated that Plaintiff's Exhibit 25 for identification is the specifications of the defendant Panther Oil & Grease Manufacturing Company under which this primer in question is manufactured for market, with the exception that the reference to United States Patent No. 23992813 should be eliminated, the jell itself being manufactured pursuant to the patent, but not the primer as a whole.

Plaintiff's Exhibit 25 admitted. (T302)

PLAINTIFF'S EXHIBIT No. 25

"Panther Oil & Grease Mfg. Co. Specifications for Roofing and Waterproofing Asphalt Primer.

"Battleship Asphalt Primer shall consist of an Asphaltic and special waterproofing oils that are manufactured under United States Patent No. 2,392,813, and thinned to a suitable consistency. The Battleship Primer shall also conform to the following Physical and Chemical tests:

	Minimum	Maximum
A. P. I. Gravity at 60°F.....	21.0	23.0
Specific Gravity at 60°F.....	.9100	.9279
Pound Per Gallon at 60°F.....	7.578	7.727
Viscosity S F at 122°F.....	200	240—JMK
Flash Point T. O. C. °F.....	80

	Minimum	Maximum
Distillation Tests		
A. S. T. M. D.-402-36—JMK		
Distillate % by volume to 437°F.....	23.0	30.0
Distillate % by volume to 500°F.....	29.0	36.0
Distillate % by volume to 600°F.....	33.0	40.0
Distillate % by volume to 680°F.....	36.0	44.0

Tests on Residue from Distillation

Softening Point (R & B).....	140	155
Penetration 77°F-100 gm-5 sec.....	30	70
Ducility 77°F-5 cm- min.....	8 minimum	
Ducility 39.2°F-1 cm-min.....	4 minimum	
Oliensis Spot Test.....	Negative	

Battleship Asphalt is resistent to mineral acids, salts, alkalies and other corrosive chemicals.

Resistance to acids:

Battleship Asphalt Primer shall withstand for 6 hours a saturated solution of sulphuric acid, nitric acid, picric acid, hydrochloric acid, hydrofluric acid, alkalies and salts.

Asphalt-Waterproofing Oil Portion. (These specifications required before solvent is added.)

	Minimum	Maximum
Softening Point (Ring & Ball).....	150°F	170°F
Penetration 77°F-100 gm-5 sec.....	30	50
Penetration 32°F-200 gm-60 sec.....	10
Penetration 115°F-50 gm.....		90
Ductility 77°F-5 cm-min.....	5
Ductility 39.2°F-1 cm-min.....	4
Oliensis Spot Test.....	Negative	

Solvent Portion

A. P. I. Gravity at 60°F.....	49.0	51.0
Specific Gravity at 60°F.....	.7753	.7839
Pounds Per Gallon at 60°F.....	6.455	6.526
Initial Boiling Point °F.....	190—JMK	
10% over °F.....	230	
50% over °F.....	290	
90% over °F.....	400
End Point.....	450—JMK

JOHN C. COOK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T303)

I reside in Spokane; I am a professional engineer, licensed in Washington and Idaho, licensed in civil engineering. I own and operate the Washington Technical Laboratories here in Spokane, which I purchased in August, 1953. [89]

I received my technical training at the University of Idaho, graduating in June of 1947 with the degree of bachelor of science in civil engineering. My last year in college I had a very light course and I was foreman of the testing laboratory at the University, which is a branch lab of the State Materials Lab of the Idaho Bureau of Highways in Boise, and at that time we were running routine tests on construction materials. In that year, the testing of asphalt materials probably made up at least 10 to 20 per cent of my work. I have had two years of college chemistry.

Following graduation, I went to work for the Idaho Bureau of Highways in the materials testing laboratory in Boise as assistant to the state materials engineer. Upon receiving my license, I was given the title and position of testing engineer in the same laboratory, and was so engaged from 1947 until 1950. We had a regular asphalt department, which I supervised, as well as other departments in

(Testimony of John C. Cook.)

my position as testing engineer for the state. It was my job to oversee the tests to determine the characteristics of these materials and analyze them to see if they met the Idaho specifications as to asphalt road materials. We ran/flash tests, viscosity tests, ductility tests, distillations, penetration of residue, and so on. We also had a few commercial tests on petroleum products, but I don't recall actually testing asphaltic roofing materials in Boise. [92]

Asphaltic road materials and asphaltic roofing materials are both petroleum products and we would run essentially the same tests, except the apparatus might be a little different.

After 1950, I went to work for the Atomic Energy Commission in Idaho Falls in the testing laboratory on the project itself as assistant to the materials engineer; later becoming materials engineer for the AEC in Idaho at its large facility near Arco. There we had complete tests of all the reactor projects, as well as normal housekeeping, buildings, maintenance, performing all the tests incident to those materials, including fuel oils, cutback asphalts and road materials.

From that position, I entered my present business where we are engaged in all types of commercial testing, such as fuel oil, petroleum products, joint sealer compound, another petroleum product, including the same tests I have mentioned.

In September of last year, I went out to the Rosenbaum place and sampled some of the asphaltic

(Testimony of John C. Cook.)

material from a 55-gallon drum which bore a label which stated: "Battleship Primer, Panther Oil & Grease Manufacturing Company." I would say Exhibit 23 is the same as the one I observed on the drum, and I observed no other labels. Prior to obtaining the sample, the bung in the top was tight and I had to [93] use a wrench to open it. There were no other openings in the barrel. At that time, I did not measure the contents of the barrel, but in the last week or 10 days I went out again and found by measurement it was five inches from the top of the barrel to the level of the liquid with the barrel in a vertical position.

I obtained my sample with a three-quarter inch pipe by thrusting the pipe down through the gooey mess. To insure a non-contaminated sample, the outside of the pipe was twice scraped free of the material onto the ground. It took at least a half a dozen dips to fill the one-quart container from the inside of the pipe, after which I placed the lid back on the barrel and the lid on the container and came on back to the lab. At that time, the material was very thick, very viscous, almost in a semi-solid state.

The following day we ran a flash test using a method accepted by the American Society of Testing Materials. There are several methods which can be used, depending upon what flash you think you are going to get. We used the Tag. open cup and the Cleveland open cup to determine the flash.

In making these tests, you take a given quantity

(Testimony of John C. Cook.)

of the material, place it in a container having a mark on it so that you get the same amount each time. In the Tag. test, a small cup is sitting inside another cup with water around the inner cup, eliminating hot spots in the material. [94] You have a check on the temperature while heating by leaving a thermometer immersed in the material but not touching the bottom of the container, as it would be slightly warmer. Then you keep passing a bead of flame of standard size over the surface of the liquid, and when a flash or explosion is seen to occur, you read the temperature and that is called the flash point. The bead of flame is held approximately a quarter of an inch or less above the surface of the liquid in performing this test.

In the Tag. closed cup test, a cover is used and you open the cover just a very minute amount and drop the flame down into that. In that case, a definite explosion is heard, a little "poof," and that is the flash point.

In my experience, I have run hundreds of these flash tests.

When we ran the flash tests of this material in September of 1953, we obtained flash points between 85 and 91 degrees Fahrenheit, which means that at warm room temperature, the material is subject to flash.

Flash point is the temperature at or above which any flammable liquid would be emanating sufficient vapors to be of an explosive mixture when com-

(Testimony of John C. Cook.)

bined with the surrounding air if there was a flash or a flame to ignite it.

Materials of low flash point are hazardous because if a person didn't know of this condition and was smoking [95] around them or happened to drop a hot spark in them, with these vapors coming off, you would get an explosion, or a fire, certainly. If the heat were sufficient, it would ignite these vapors without a spark being present if they were at the proper condition. The vapors are not necessarily right at the material. In the Cleveland open cup test, the vapors are up above the cup when you ignite and you are not igniting the material, you are igniting the vapors.

This means that when exposed to the surrounding atmosphere, this material at any temperature above 85 to 90 degrees Fahrenheit, is giving off vapors capable of causing an explosion.

There is a wide range of flash points in petroleum products. Most oils have higher flash points than the material in question.

I ran three tests with the closed cup method and two with the Cleveland open cup, and my chemist ran two with the Cleveland open cup, the range of flash points being between 85 and 91 degrees.

As previously mentioned, I obtained a further sample from this same barrel within the last week or ten days, at which time the bung was in tightly and it was pretty well sealed with material around the bung. We sampled in the same maner as before, using a clean aluminum tube, and obtained four

(Testimony of John C. Cook.)

quart samples. We ran further flash tests on [96] these samples, as well as tests requested on a portion obtained from distillation. On tests of the entire mixture, we obtained flash points ranging from 81 to 91 degrees, using the Tag. and Cleveland open cup methods. We then distilled off the solvent in the primer, which would be any material which would be used to cut back your material or bring it to a liquid form at which it could be used, and obtained a flash point of 57 degrees Fahrenheit from the distillate.

In sampling this material on these occasions, I did not detect the presence of any water. I believe I would have detected the presence of water had there been any present.

Cross Examination (T321)

All asphalts are derived from crude oil in the first instance through distillation at the refinery. They are the jell or residuum left over after the more volatile portions of the crude oil have been distilled off. The distillates thus taken off can be sold under a variety of titles, some being within the flash points of naphtha, some in the flash points of kerosene, depending upon what the refiner wants to obtain as to how the distillates that come from the crude oil are rearranged.

The asphalt in this form would be too thick and viscous for use as a roofing primer. [97]

Essentially, I would agree that a satisfactory roofing primer should have these characteristics:

(Testimony of John C. Cook.)

Flowability or brushability, or the ability to spread easily; a degree of penetrability so that it will be absorbed into the material on the roof; and ductility, so that it will not crack and fracture and break apart in cold weather. Without a solvent, asphalt would not have these characteristics, so that certain of the essences which have been distilled off from the crude oil are used to cut back this material.

My experience prior to conducting these tests has been with paving asphalts, but petroleum products have standard tests.

The desirable characteristics of a roofing primer can only be obtained through the use of a solvent. It is not true, however, that in order to make the product usable, it is necessary to make it hazardous.

I am vaguely familiar with the fact that the Interstate Commerce Commission has regulations governing the shipment of petroleum products.

(An objection was made to further inquiry relating to I.C.C. regulations on the ground they are solely concerned with hazards in transit, not the hazard to an ultimate consumer; overruled.) (T327-329)

I am not familiar with the fact that the I.C.C. has established three general classifications of materials: [98] those with flash points below 20 degrees Fahrenheit; those with flash points between 20 and 80 degrees; and those with flash points above 80 degrees. I am not a transportation engineer. I know that certain petroleum products with very low flash points carry red warning labels; that there are

(Testimony of John C. Cook.)

warning labels on other such products having flash points between 20 and 80 degrees Fahrenheit. I have seen warning labels on road oil shipped from Utah to Idaho which had a minimum flash point of 80 degrees.

(Objection was renewed to the line of inquiry. A discussion was had in the absence of the jury between Court and counsel, in which plaintiff contended that: the I.C.C. regulations, being the best evidence, should be offered and ruled upon; that the said regulations were intended to establish safety standards only as to transportation of hazardous materials, not having any bearing upon the duty owed by a manufacturer to a consumer; that they were designed to protect the instrumentalities of commerce; that the manufacturer had a positive duty to warn a consumer of the hazards of an inherently dangerous material; that a state statute covering the sale or shipment of such a material was being violated by the defendant; that this inquiry exceeded the scope of the direct examination.

The defendant urged that: an interstate shipment was involved; that I.C.C. regulations furnish the only [99] known standards in the industry; that the indiscriminate use of warning labels would defeat its own purpose; that compliance with the said regulations would not furnish a complete defense to the action, but should be considered by the jury as affecting the burden of proof of the defendant; that the standards contained in the I.C.C. regulations are recognized by all common carriers; that the

(Testimony of John C. Cook.)

state statute referred to is in direct conflict with the scope of the Act of Congress and I.C.C. regulations enacted pursuant thereto and has been superseded by the said act.

The Court ruled the I.C.C. regulations to be immaterial and that the inquiry went beyond the scope of the direct examination.) (T330-344)

On motion, the jury was instructed to disregard all reference to I.C.C. regulations and the matter was stricken.

The bases for fixing standards for flash point tests are fixed by the American Society for Testing Materials, referred to as A.S.T.M., and also the American Association of State Highway Officials. The tests must be carried out very exactly as to procedure and equipment. In the Tag. open cut test, the dimension of the container, the thickness of it, are fixed exactly.

The distance of the flame from the bottom of the [100] container may be varied to adjust the rate of rise of temperature of the material being tested. Essentially, it is correct that the A.S.T.M. specifies just how far the jet flame must be below the bottom of the container by giving a diagram of the equipment. They also specify just how high the material must come in the cup. The distance of the flame above the material is fixed both by dimension and by the manufacturer of the equipment. I don't know exactly whether the standard in the Tag. test is a quarter of an inch or one-eighth of an inch. The standard is not an approximation, but an exact

(Testimony of John C. Cook.)

measurement. We removed the equipment in our tests and placed the flame anywhere we wished and found very little variation in the flash point.

If you held the flame an inch above the material, it probably would change the flash point in the Tag. open cup test, but not in the Tag closed cup method. Any deviation from prescribed procedures would not result in a standard test.

The flash points I obtained do not refer to the temperature of the atmosphere, but to the temperature of the material itself, as reflected by the thermometer in the material at the time the flash occurs.

If the room temperature were at the flash point of the material or above, while the surface of the material was 15 degrees below that point, it would not flash, though [101] I can't conceive of that condition. A viscous material, such as this primer, responds slowly to outside temperatures.

(An objection was made to reference to the instructions contained in Exhibit 14 as not pertaining to the primer in question; overruled as being a question for the jury.) (T354-355)

I suppose an instruction that it took 72 hours to warm this material after becoming chilled would be an indication that it was slow in achieving room temperature.

I checked the quantity of material taken from the barrel on the Rosenbaum place on April 16th. I testified on deposition on April 15 that on September 5, 1953 when I was out there, the barrel was "about" or "approximately" two-thirds full and

(Testimony of John C. Cook.)

that the material was down about a foot from the top of the container. The other day I found it to be exactly five inches.

I have not made a viscosity test at any time of this material.

I first took the flash point of the primer and found it had a range from 81 to 91. I then raised the material to a certain temperature and obtained a distillate of 30 per cent from a 200 c.c. sample, on which the flash point was 71 degrees. We made the distillation twice in order to obtain enough material to run the flash test. The [102] 57 degree flash point was of the 10 per cent portion.

Presumably, if you distilled a gallon of beer, you would get 4 or 5 per cent alcohol by volume, and a flash test of the latter would indicate the flash point of alcohol, and not of the beer, but the corollary escapes me somewhat. This primer, being a mixture of an asphaltic and a cutback, the lighter fractions come off as that material heats up and you get a lower flash point on those fractions.

We went up to a temperature of 437 degrees in our distillation of the solvent portion to derive 30 per cent by volume. The first amount of distillate was obtained at 368 degrees, but it was coming off all the time and we were running it at a 10 per cent point. It was from the distillate itself that reflected the lower flash test.

It is true that practically every ingredient derived from crude oil, if handled in the same way, will produce essences which are very much lower

(Testimony of John C. Cook.)

than the flash point of the essence as a whole, the material as a whole. We were attempting to determine the type of solvent and its flash point. In determining the hazard involved, the flash point of the mixture as an entity is used.

Defendant's Exhibit 26 for identification is a photostatic copy of reports from my laboratory, plus a report from the Idaho College of Engineering. When I came into possession of the laboratory, I found a record there of the [103] former owner reflecting a former sampling of this primer on about July 27, 1953, and indicating a flash point of less than 90 degrees and a fire point at 95 degrees, and that was all he showed.

My first test on September 5th showed a flash point of 95 degrees and a fire point of 100 degrees; Test No. 2 showed a flash point of 91 degrees and fire point of 99 degrees.

On September 12th I took a sample of the material to the University of Idaho at Moscow, and they showed a flash point of 85 degrees and a fire point of 100 degrees.

None of the tests shown in Exhibit 26 are of the distillate. Testing of the distillate is not a customary practice, but we were not working with a customary product. At the University of Idaho it was assumed this material would meet some sort of specifications, so the A.S.T.M. specifications were used and the material was found to be completely out of that.

(Testimony of John C. Cook.)

I am not familiar with the 5th edition of "Asphalts and Allied Substances" by Abraham.

I don't know that this is a rapid-curing cutback we are dealing with in this primer. I don't know what it is. We used the specification that applied to a roof primer, as such. The title of the specification we used was not that of a primer for controlling dampness on concrete. [104]

Defendant's Exhibit 26 admitted. (T367)

(Results of tests by University of Idaho contained in Exhibit 26 read to jury by counsel for plaintiff.)

Redirect Examination (T368)

The former owner of my business is no longer engaged as a testing engineer. That is the reason I was asked in September to obtain a further sample.

There are many solvents which could be used in this primer having flash points from 100 to 130 degrees, which would certainly render the material less dangerous to use. These solvents would be just as satisfactory as the solvent used in this primer. They are probably a little higher in price.

The last tests I made in April were conducted at the University of Idaho laboratory.

Recross Examination (T370)

Stoddard solvent has a flash point of around 130 degrees. The highest flash I obtained from the solvent in this primer was 79 degrees.

(Testimony of John C. Cook.)

Redirect Examination (T371)

By using a solvent with a flash point of 130 degrees, the flash point of the entire mixture would be well above 130 degrees, as the lowest flashing matter is the [105] solvent.

JAMES G. McGIVERN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T371)

I am James G. McGivern; I reside in Spokane; I am Dean of the School of Engineering at Gonzaga University, and have been for 15 years. I hold a bachelor of mechanical engineering degree from Northeastern University; a master of arts degree in mathematics and physics from Boston University; a master of science degree from Harvard University in mechanical engineering, and did research work at Harvard for 2 years following my degree in mechanical engineering. I have had 2 years of general college chemistry, then I took physical chemistry, and then I took considerable thermo-dynamics. I had a whole course in the testing of fuels and lubricants and am acquainted with the various standard tests.

I left Harvard in 1934 and taught mechanical engineering at Washington State College from 1934 to 1939 and was a member of the Engineering and Experiment Station where we did research work on magnesium alloys and effect of shape of shaft-

(Testimony of James G. McGivern.)

ing, ability to withstand loads. At Gonzaga, I have jurisdiction over the chemical, electrical, civil and mechanical engineering courses. I supervise the testing [106] laboratory in fuels and lubrication, in addition to another testing laboratory for the strength of machine parts, and am familiar with most of the processes involved. I have tested many petroleum products and am familiar with their characteristics.

I am also a member of the State Engineering Board of Examiners and I do consulting work on the side and have for the last 15 years.

On March 24th of this year, I obtained a sample of the material from the drum on the Rosenbaum place, which was sealed so that it was necessary to use a wrench in opening it. There was a label on the barrel which wasn't too easy to read. For all practical purposes, Exhibit 23 is the same as the label on the barrel. I think it is the same.

I had a special sampling cup and I took a sample first from the top part of the drum, then from the center part, then from the bottom part, and in all I took out about a gallon of this substance, which took about three-fourths of an hour to accomplish. I believe I obtained a representative sample of the material. We then tightened the plug on the drum, I sealed my container, and took the gallon sample to the laboratory at Gonzaga for testing.

The first test I made was to determine the flowing characteristics of the primer or its viscosity. At 122 [107] degrees Fahrenheit, I found it took about

(Testimony of James G. McGivern.)

1100 seconds for the given amount of material to flow through this small tube, which is a standard testing device. The standard A.S.T.M. specification calls for it to go through this device in 150 to 225 seconds at 77 degrees Fahrenheit, but in my opinion this material would not have been capable of passing through the device at that temperature. Exhibit 25, the defendant's specification, calls for a viscosity S F at 122 degrees of 200 minimum to 240 maximum seconds. It would take five times as long for this material to go through as the specification calls for.

The sample I obtained was a semi-solid, a very heavy, viscous material. It was necessary to scoop it out of the sampling device, place it on the side of the container and let it drop down inside. In my opinion, I do not believe it could have been brushed on a roof at any temperature below 100 degrees Fahrenheit; it would have to be 160 degrees.

The material I got from the drum is a mixture, not a compound. If it were a pure substance, it would have a constant boiling point and it would have a flash point that would be typical of that substance; whereas, this material contains many of the hydrocarbons from the crude that have been distilled out at various temperatures and mixed together, and each one has its own properties. A mixture is a [108] combination of materials that can be separated without chemical means; in this case, just by heating it.

I ran a flash test of the entire mixture using the

(Testimony of James G. McGivern.)

Cleveland open cup method and obtained a flash point of 83 degrees Fahrenheit. Flash point is the temperature of the liquid when the vapors immediately over it, due to that temperature, are at an explosive mixture with the air, at or above that temperature. This means that any time this material is above its flash point, there are vapors immediately over it that, if ignited, could explode.

I have handled a considerable number of inflammable fluids and in my consulting work am brought in contact with industry and the handling of flammable fluids and substances. I think it is normal custom in industry that any material with a flash point under 100 degrees is considered dangerous, and any material between 100 and 150 should also be so labeled. The custom of prudent manufacturers is to use a red danger label on materials with a flash point of 100 degrees Fahrenheit. As to those between 100 and 150, the custom is to label "Do Not Heat; Do Not Have Near a Fire," general precautionary measures. Below 100, they are dangerous, actually dangerous, and a red label "Dangerous, Do Not Heat" is used.

I ran three or four flash tests and obtained substantially 83 degrees Fahrenheit in each one as an average [109] value.

I next ran a distillation test on the whole primer as I was interested in trying to determine the characteristics of the solvent employed and also to see if the primer itself met the A.S.T.M. specifications. Using the standard A.S.T.M. method, we took some

(Testimony of James G. McGivern.)

of the primer and put it in the flask and heated it and that boiled off. We then took the distilled vapors and put them through coils that ran through cold water and obtained the amount of this solvent that came off at the corresponding temperatures, which we did for the complete sample. At 437 degrees, we obtained 24 per cent solvent. Solvent is a material that will dissolve the heavy material to make it less viscous and which, after the material has been placed in position, will evaporate off and leave the material that you want as a weather coating remaining.

The solvent I obtained through distillation was less than that specified by A.S.T.M. for that temperature. I gave that a distillation test similar to what we give for gasolines, naphthas and kerosenes, and I found that the distillation curve obtained corresponded very closely to a gasoline.

I obtained the specific gravity of the whole solvent and then the specific gravity of the parts of the solvent as we distilled it off progressively. The first [110] part that distilled off had a specific gravity of .73.

Specific gravity means weight. Using water as 1, it means for an equal volume this would weigh .73 of the same volume of water. For the complete solvent, the specific gravity was .77.

The first part of the solvent distilled off, which corresponded to 5 per cent of the total primer that we used, the flash point was minus 24 degrees; the

(Testimony of James G. McGivern.)

second 5 per cent was 54 degrees; and it progressed somewhat above that.

From the various tests I conducted, in my judgment, the solvent has all the characteristics of a gasoline and, in my professional opinion, I would say it was gasoline.

There are many purposes of flash point, one of which is to sort of classify a material for transportation purposes, as has been brought out here. Actually, the flash point of a mixture of a combination of materials doesn't necessarily tell you the worst story; it is one measure of its hazard. The whole story of the hazard of this primer is the light products, the gasoline products, that are in it. When they mix with air to a percentage of about 11½ per cent vapor to air, they are explosive, and, if ignited, will not burn but will ignite instantaneously, which is termed an explosion.

I would say that this material is more hazardous than its flash points would indicate, because of the [111] distillation curve of the solvent and the flash point of its parts. This is a mixture and the danger of it is its weakest part, and the part that gets into the air actually is the light part. The part that remains in the primer is of no danger as long as it is in the primer.

From my sampling and handling of this material, I do not believe there was any water present in it.

In my opinion, there would be no difference in the results of tests on this material on July 8, 1953, at the time of the fire, and at the time my tests

(Testimony of James G. McGivern.)

were made, it being closed all the time. If the drum had not been closed, some of the lighter material would have evaporated off and its flash point would probably have been higher, indicating less hazard after exposure.

Cross Examination (T391)

I don't know what this barrel might have been exposed to between July 8, 1953 and March 24, 1954. If the material had been exposed for a couple of hours within a few feet of the burning building and had attained a temperature beyond 600 degrees, it might produce a change, a cracking. I would expect that.

Cracking is the breaking down of the heavier molecule to make a lighter molecule out of it through the use of heat and pressure.

If water had been in the barrel for a period of [112] months, I would expect it to be there in droplet form, I wouldn't expect it to be in solution. The presence of water would have no effect on our viscosity tests, as we took our tests at higher temperatures and the water would have changed to steam, it wouldn't have been in the material anyway.

The flash points I obtained ranged from 82 to 84. Testing techniques would probably account for differences in flash tests. We took our sample right from the container and put it immediately into the cup and made our tests as quickly as possible. If it is left any time at all, some of the light ends might

(Testimony of James G. McGivern.)

be lost. Without a difference in testing techniques and unless something had happened in the interim, I would expect, if the barrel had been open, to have the flash point going up, rather than going down.

On my deposition the other day, I stated it was my opinion when I examined the drum on the 24th of March that the level was 9 inches from the top. After being informed Mr. Cook thought it was 15, I moved down to 15. I have since talked with Mr. Cook and I think now I will go up the same distance I went down, and I will be about 5 inches. We had to turn the barrel a little bit at an angle to pull this thing out, and it was an approximation. I am revising my estimate in the light of the measurement Mr. Cook made.

The difference in flash points obtained shortly after the fire of from 91 to 95 and my average value of 83 [113] in March of 1954, I think is accounted for, as I just tried to explain, by sampling technique. We are testing that first vapor that comes off at that temperature of the explosive mixture, a very small part of the total sample, and, if we are not measuring that same vapor, through some means it could evaporate off, there could be quite a difference.

Had the barrel been open, you would have a skin on the top similar to on your paint pail, and you don't get much evaporation after that first oxidation is formed. If the barrel had, in fact, been a third empty, as Mr. Cook first estimated, there would be no tendency for evaporation to occur, be-

(Testimony of James G. McGivern.)

cause that is still air in there and it is closed. You need circulation of air to get evaporation. All you do is saturate the small amount of air that is present.

Had the barrel been a third empty in September and gasoline later added so it was 5 inches from the top when I took my sample and made tests in March, we certainly wouldn't have had that viscosity and our distillation curves wouldn't be as they are. I have only 24 per cent of the solvent at 430 degrees. If they had added one-third more gasoline, I would have all that in addition. I don't think that adequately explains the difference in flash points obtained; I think it is close enough to be within the experimental technique. [114]

I am just conjecturing, of course, because I don't know what happened to the material between September and March.

The specifications I used for contrast purposes for the primer, but not the solvent, are A.S.T.M. designation D-41 issued in 1941. There is, however, a newer one issued in 1948. The specifications I used state:

"These specifications cover asphaltic primer for use when specified with asphalt in dampproofing and waterproofing below or above ground level for application to concrete masonry surfaces."

It is not like comparing apples and oranges, as this is a test for an asphaltic cutback. It is not used exclusively on masonry walls. I have checked with three roofers and common practice dictates it

(Testimony of James G. McGivern.)

has been used for roofing. The main reason it is used for concrete is the fact that the hot asphalt does not bind with the concrete. This is a prime coating on concrete, on which they may put the other if they so desire.

I don't know specifically that warning labels are not used on materials with a flash point of less than 100 degrees by Standard Oil of California, Standard Oil of Indiana, or Associated Gas.

I have heard of Dr. Abraham, but am not familiar with his book on asphalt and don't know that he fixes a [115] standard of a rapid-curing cutback at 80 degrees Fahrenheit Tag. open cup. If that is the case, I think people should be warned. I do not recognize Dr. Abraham as the standard authority on the subject.

(Discussion before the bench between Court and Counsel out of hearing of jury, in which Mr. Graves stated he felt the witness had opened the matter of the I.C.C. regulations and similar regulations; that an offer of proof would be made if the matter were ruled out. The same ruling was made by the Court. Preliminary examination as follows:)

I consider the man at Illinois Institute of Technology, I believe his name is Tichenov, to be the standard authority on this subject. He has done great amount of research on petroleum products and has published original papers. I cannot refer you to any data in which he fixes the standard for rapid-curing cutback asphalts, nor do I have that available to me.

(Testimony of James G. McGivern.)

(Objection to question as to whether the witness knew manufacturers of petroleum products pay close attention to I.C.C. regulations for shipment of combustible liquids; overruled). (T407)

I know by hearsay. I was just here when the jury was dismissed and there was quite a long discussion on it. I have heard something about it generally, but am not an authority on it. I do not know that they pay close [116] attention to regulations fixed by postal authorities for shipment of combustible liquids both by ground and airmail, nor do I specifically know of the regulations of the Coast Guard pertaining to shipments of same matter by marine vessels.

(Objections to questions concerning witness' knowledge of postal and Coast Guard regulations; overruled.) (T408)

I believe there is a distinction between the requirements for safety with respect to a drum that is closed and to be carried in transit, as against the safety characteristics of a user in the application of that particular commodity. The I.C.C., as I understand it, is interested in the regulations that would make for safe transportation of the product.

(Objection to inquiry as to whether witness knew ICC regulations require certain type of label on containers where the flash point of the material is 20 degrees or less; sustained. Jury excused for day and discussion followed between Court and counsel in which defendant contended: Witness attempted to qualify himself as expert on labeling practices

(Testimony of James G. McGivern.)

of the liquid in the barrel, I was approximating from my memory and I so stated. [119]

(Objection to the question: "You have testified that prudent manufacturers place red dangerous or warning labels on petroleum products having flash points below 100 degrees Fahrenheit. Why, if you know, do prudent manufacturers do that?" as calling for a conclusion as to state of mind of manufacturers, not specifying the manufacturers, use of product or flash point, highly conjectural; overruled.) (T421-422)

Under normal atmospheric conditions, a material with a flash point below 100 degrees, in all probability, would have a flash point lower than the atmospheric condition and thus vapors would be evolving from the top and filling the enclosed space and therefore be subject to explosive conditions. The 100 degree breaking-off point is by reason of the fact that there may normally be atmospheric temperatures to that range.

In my opinion, it was not necessary for the manufacturer of this primer to have used a solvent with such a low flash point. A naphtha could have been selected with a small difference between the boiling point and end point, which would have resulted in the flash point of the entire mixture being over 100 degrees.

Recross Examination

(T424)

In the Cleveland open cut method of testing which I employed, the thermometer is inserted sub-

(Testimony of James G. McGivern.)

stantially to [120] the bottom of the cup, which would reflect the average temperature of the material being tested, and the reading thus taken determines the flash point.

Had the three barrels of primer on the loading platform had their bungs taken out to speed the warming process, they would not have bulged if exposed to heat as I have indicated.

J. M. KNISELEY

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

(T426)

My name is J. M. Kniseley; I reside at North Bend, Washington, near Seattle, and have resided in that vicinity for about 50 years. I am a professional chemical engineer in and around Seattle and have been about 28 years. I have my own office, which is known as the J. M. Kniseley Engineering Company.

I received my professional training at the University of Washington, graduating in 1926 with a bachelor of science degree in chemical engineering. Upon graduation, I was employed by Laucks Laboratories, Incorporated, an organization of commercial chemists and chemical engineers, with whom I was associated until 1949. I started out as a chemist and ultimately became manager and vice-president of the company and also president

(Testimony of J. M. Kniseley.)

of Laucks Chemical Company, [121] an associated company. We normally operated with from 20 to 26 employees, 15 to 18 of whom were trained personnel. The firm afforded technical service for industry located around Seattle, the shipping and manufacturing industry.

All during this period of employment, I had continual experience in testing road oils and applied asphalts and roofings and other types of asphaltic materials. Early in my technical career, I obtained a Certified Marine Chemist's Certificate, which is issued by the American Bureau of Shipping. The purpose of this was to service the shipping industry so that vessels undergoing repair might safely use welding and burning equipment in their petroleum tanks. I was the first in the organization to obtain this certificate and it became more or less my specialty and I still carry that certificate.

While it is called a Certified Marine Chemist's Certificate, it is recognized all over the country as the proper qualifications for testing for explosive conditions and is used on shore plants, as well. If a fabricator employs the holder of such a certificate, that is recognized as due precaution and he is excused from being accused of negligence. Many times I have been employed to determine the cause of industrial explosions, and have had more experience than anyone else in the Seattle area in this field. I belong to all the professional societies that are associated [122] with my particular lines of work. I think I am thoroughly familiar with the testing

(Testimony of J. M. Kniseley.)

of asphalt materials to determine their various characteristics.

Pursuant to request, I obtained a sample of the material from a drum on the Rhea Rosenbaum place in November of 1953. The barrel from which I obtained the same was a 55-gallon drum bearing a label stating "Battleship Primer" and "Panther Oil & Grease Company," with a picture of a battleship, being the same label as Exhibit No. 23. The barrel was intact, apparently having had no damage, was clean, was not bulged or wrinkled, which I particularly observed because I knew it had been involved in this fire. The bung was very tight which I opened, as well as the smaller three-quarter inch one which I thought at first I might use. The label had a couple of scratches on it, but no evidence of scorching whatsoever. When I withdrew my sample in November, 1953, I measured the level of the material with my finger and am certain it was between four and five inches from the top. I always note the level of a material in a container, because in the gauging business quantity is just as important as quality. Normally, a 55-gallon drum of asphaltic material is not filled to the top, because a slight temperature change would cause them to bulge and leak. This barrel was of about average level, maybe just half an inch or so down. [123]

I obtained a sample of just under a gallon with a piece of equipment called a trier, which tends to cut a core out of the material. I was able to obtain a large quantity at each thrust, but had to scrape it

(Testimony of J. M. Kniseley.)

off into my gallon can because it was a paste, practically a solid. From my observation of this material at the time, I would say it wasn't brushable at all under normal conditions. I was very careful in obtaining my sample to thrust the trier in at as many angles and depths as possible so as to obtain a representative cross-section of the material. I think I replaced the rubber gasket in the bung and put the bung back in tightly.

I then took the sample to Seattle and performed tests for flash, viscosity, solubility in carbon bisulphite, distilled off the solvent material, and tested for penetration of residue after the distillation. I found the viscosity much too high, it requiring approximately 1100 seconds to flow through a standard orifice; the solvent content was 31 per cent; penetration of solids after the solvent was removed was 36 units using a standard test; and the amount soluble in carbon bisulphite was practically complete, being 99 per cent. Using the Cleveland open cup method, I obtained a flash point of 91 degrees.

I employed a standard test method in the distillation and noticed the presence of extremely volatile vapors as soon as I started to distill this material. Those [124] volatile vapors are hazardous, inflammable, and it is the ease with which they come off that largely measures the danger involved in handling, and I was surprised at the ease with which they came off.

(Objection to state of mind; question rephrased.)
(T440)

(Testimony of J. M. Kniseley.)

The first vapors came off much earlier in the distillation than normally would be expected, and my conclusion was that the material contained an extremely volatile solvent. I suspected it might be what is normally described as gasoline. "Volatile" is the term for the ease with which anything may be boiled. Gasoline starts to boil at less than a fifth the heat required for water and starts to boil at a low temperature. All liquids give off vapors, even at normal temperatures, and not merely at their boiling points. Boiling point is the point at which the vapor pressure reaches the air pressure and a liquid is vaporizing freely.

I then subjected the primer to a normal test for gasoline, a dilution test, which we use for determining gasoline in crankcase oil. I used the standard dilution equipment for lubricating oils and found there was gasoline present. I then enlarged the scale of the test and actually recovered quantities of this gasoline, which I verified by running a distillation test on the material, and found it had the properties and characteristics of gasoline.

I am familiar with the distillation characteristics of the various grades of gasoline and other solvents and petroleum products. The materials that distill over at low temperatures are the prime offenders in explosions and fires.

I actually recovered 8 per cent of the primer as gasoline, which was not a complete recovery due to difficulties encountered in the testing procedure.

Flash point is the temperature at which a mate-

(Testimony of J. M. Kniseley.)

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I actually recovered 8 per cent of the primer as gasoline, which was not a complete recovery due to difficulties encountered in the testing procedure.

Flash point is the temperature at which a mate-

(Testimony of J. M. Kniseley.)

rial gives off inflammable vapors in such quantity to cause an explosion. Therefore, at or above 91 degrees Fahrenheit, or whatever the actual flash point is, this material, when exposed, would give off sufficient vapors to form an explosive mixture with the surrounding air. Depending on the air currents, it would be difficult to tell where these vapors would be. They are quite inclined to form pockets. Under proper circumstances, they have been known to fill an entire room. There are innumerable things which will cause an explosion once the vapors have formed an explosive mixture, such as a slight spark, flame, or even being exposed to a hot wire. In the case of this material, flash point is not the whole story of the hazard, because the material contained this gasoline which, when vaporized, was just as dangerous as any gasoline could be. At temperatures slightly above its flash point, the volatile vapors came off much more rapidly than normal. [126]

This primer is a mixture. In terms of hazard of a mixture, it is the character of the light, volatile material that determines the true hazard. Mixtures having solvents with extremely volatile characteristics or low flash points below that of the entire mass have caused trouble ever since these petroleum products have been in general use. It is the presence of the light, volatile material in industrial products that has caused the fires and explosions, and to a large extent they have been removed from practically all of the materials that are offered for

(Testimony of J. M. Kniseley.)

sale in normal commerce. In this material, the highly volatile parts had not been removed.

I believe this material to be more hazardous than the flash point itself would indicate.

Plaintiff's Exhibit 27 for identification is a graph prepared by me showing the distillation curve or rate of distillation of the gasoline extracted from the primer and various other substances. I employed a steam distillation process so that the material was not subjected to a temperature higher than 212 degrees.

Rate of distillation is the best measure of hazard of a flammable material in terms of use in the open. The purpose of steam distillation is to remove unaltered those portions mixed with a heavy material which might be altered by temperatures necessary to remove them, and I obtained the [127] gasoline solvent unaltered.

Plaintiff's Exhibit 27 admitted. (T452)

On Exhibit 27, I laid out scales from zero per cent to 100 per cent and zero up to 500 degrees Fahrenheit. In carrying out the distillation, we have the material in the flask, we heat it, it distills over through a condenser and collects into a graduated tube. When the tube reached 10 per cent, on up, we make the reading of the temperature and write it down. This curve, then, is just the temperature at which these various percentages have been distilled off. Aviation gasoline, for example, at 360 degrees approximately 90 per cent of it was distilled. In each instance, the curve is an exact

(Testimony of J. M. Kniseley.)

measure of the volatility of the material indicated, the lower curves being the more highly volatile. The more volatile a material is, the lower it boils and the easier it is to create a hazardous condition.

The lower two curves on the exhibit are two grades of aviation gasoline. There are petroleum products more volatile than aviation gasoline, but it is, I believe, the most hazardous normally circulated in commerce. The red line on the graph represents the material I extracted from the primer, and just above that the next two lines are ordinary grades of gasoline used in automobiles. Above those is the material used by dry cleaners or cleaner's naphtha. Next is [128] Stoddard Solvent, which has become known in the industry as a solvent which can be used safely in compounding different materials requiring solvents to avoid the presence of these volatile materials that create the hazardous conditions. And then kerosene is what the old-timers used to burn in lamps and is considered normally safe in a household.

The flat lines on the graph are quite significant in that they indicate material that distills off in a narrow range. Until you reach a certain temperature, you are practically free from these dangerous materials. The materials with steep curves start giving them off at very low temperatures and practically at room temperature.

From my experience in testing and compounding roof primer, and also in a consulting capacity, it is my opinion it was not necessary that the mate-

(Testimony of J. M. Kniseley.)

rial shown by the red line on Exhibit 27 be used to make a satisfactory roofing primer. Stoddard Solvent would have obtained just as satisfactory results. Stoddard Solvent is a class and they generally flash above 100 degrees Fahrenheit, up to 130 degrees. If one of these had been used with a flash point of 130 degrees, it would have resulted in a primer having a flash point higher than the solvent due to the retarding effect of the asphalt. Stoddard Solvent is a premium solvent and costs more than the material used in this primer.

Once the primer in question is above its flash [129] point, it is as dangerous as gasoline in terms of hazard of flash fire or explosion. Pound for pound, gasoline has a greater boosting power than dynamite, and, under certain circumstances, gasoline vapors are considerably more easily set off than dynamite and have the additional hazard of being invisible and practically odorless.

In my experience, I have been intimately acquainted with various manufacturers of petroleum products, roofing materials and asphaltic compounds, and am familiar with their trade practices. 100 degrees Fahrenheit has been accepted as the breaking point where material is considered hazardous among prudent manufacturers of this type of material. It is the custom among prudent manufacturers to label materials with flash points below 100 degrees with red warning labels; from 100 to 150, usually there is a warning phrase in red in distinctive printing warning against the

(Testimony of J. M. Kniseley.)

danger of fire. Generally, these labels state: "Do Not Heat, Do Not Get Close to Open Flame," to use in well-ventilated room.

The practice of labeling in this manner is necessary to warn the consumer of the hazard if the material is to be standing around or used above its flash point. Where warning labels have not been used on such materials, the experience has been very bad. There have been fire and explosions and injuries.

This primer as a whole is more dangerous than some of the straight naphthas. [130]

(Motion to strike answer on ground there is apparently a wide range of naphthas; Court ruled answer should be more specific.) (T462)

Naphtha covers a range of petroleum and there are various types in terms of hazard.

(Objection to the question: "How does this material compare in terms of danger with what is commonly called Naphtha?" unless the range of naphtha is established.) (T462-463)

Voir Dire Examination

To my knowledge, the lowest flash point of any type of naphtha is below zero and the highest about 140 degrees.

(Objection renewed; overruled.) (T463)

This entire primer is more dangerous than some naphthas.

I have heard the evidence as to how this primer was heated for application, and I don't think the

(Testimony of J. M. Kniseley.)

method of heating was so important, the heating was the fault.

From my observation of this material and from my viscosity tests, it is my opinion it would have to have been well over 100 degrees Fahrenheit, or well above its flash point, before it could have been brushed on a roof.

I did not detect any water present in the material in my testing, and I believe I would have detected it had it [131] present.

I think there would not have been any significant change in the primer between July 8, 1953 and when I tested it some five or six months later. Had the cap been off the barrel for a period of time, it would have made the flash point higher in my tests and would have appeared less hazardous.

(Objection to question: If material had been kept for period of 3 months in a room in the warehouse previously maintained at 32 degrees by refrigeration, but the refrigeration equipment having been inoperative during this 3-month period, in your opinion, what would have been the temperature in that room? unless outside temperatures were shown; objection sustained.) (T466)

(Objection to question: "How long, in your opinion, would it take for the temperature in that room, after the refrigeration was shut off, to normalize with the outside temperature?" on grounds room was insulated, no showing of average outside temperatures, the information being available through Weather Bureau; overruled.) (T466-467)

(Testimony of J. M. Kniseley.)

I think it would normalize in about five to ten days. Following that, the temperature would reach some average halfway between night and day temperatures.

The fact that the manufacturer's specifications permitted a flash point of 80 degrees in the mixing of this [132] material would indicate they wanted to use materials of low flash.

Since I was able to extract at least 8 per cent of this primer as gasoline, there would be roughly 5 gallons of gasoline contained in a 55-gallon drum of this material.

(Objections were sustained to questions as to the explosive power and danger represented by the 5 gallons of gasoline.) (T468-469)

Cross Examination

(T469)

I have a record of the tests which I made and you may have it. I don't have the notebook in which I made notations while conducting the tests. I didn't make any distillation curve of the primer itself, but merely distilled to these two temperatures and recorded the percentages.

I used for comparison the same A.S.T.M. specifications which Mr. McGivern testified yesterday he used, being for an asphaltic primer used for roofing and moisture-proofing on concrete and mason work.

A good roofing primer is used to form a bond between the roof and the covering. Penetration

(Testimony of J. M. Kniscley.)

and adhesion are two different things. At least, it must have adhesion to the roof itself; whether it is necessary for the primer to penetrate, I don't know. Many primers are used on metal where they don't penetrate at all, but they do adhere. [133]

In the open cup tests for flash point, there is a variation accepted and permitted in the industry, depending entirely on the material and the temperature at which the flash occurs. As to the tests I run on the roofing primer, I don't know to the degree the variation that is permitted, but I would imagine about 5 degrees, maybe 10, depending on the temperature at which it flashed.

I have heard of Mr. Abraham, but I don't claim to be familiar with his publication, "Asphalts and Allied Substances." I don't know that I have any other work which I consider more authoritative than his book. I have used various handbooks, and so on. Largely, my work has been actually comparing materials themselves. I have had to depend on what I could do with them and what can be made out of the end product.

I do a good deal of work investigating fires and testifying as to the cause of those fires. I am not on the witness stand a great part of my time. That would be a life that nobody would live.

The A.S.T.M. does permit certain very minor variations in testing through open cup tests and those are fixed by the Society itself. That information can be derived as to permitted variations and I will try to have it this afternoon. It is not true

(Testimony of J. M. Kniseley.)

that variations between 91 and 95 degrees flash point on the one hand and 83 on the other is way [134] beyond any variation permitted if the tests are properly conducted.

In determining whether or not a proper roofing primer had been manufactured from the standpoint of safety, you would have to know more about the solvent than what you would learn from the simple distillation of the primer itself. Actually, the gravity of the solvent portion has only a very indefinite relation to the safety, but a specific gravity of .8 at 60 degrees Fahrenheit would be approximately right. Unfortunately, my thinking isn't in terms of specific gravity; I have always used the table to convert. I believe that a specific gravity of .8 at 60 degrees would be an average for safe solvents. Actually, a specific gravity of .7839 wouldn't give the indication of its safety, nor would the specific gravity of .8.

Pounds per gallon at 60 degrees has no relation whatsoever to safety. I don't know that the initial boiling points of all roofing primers on the market are around 300. They may not be. The average initial boiling point of distillates from roofing primers would be 230 or 240, somewhere in there. As to where the first 10 per cent of the distillate of the solvent of the average roofing primer would come over, I want to cooperate with you, but you have gotten beyond my mental capacity to retain everything. I can't quote those figures with any degree of accuracy and I think I would only [135] confuse the record. For purposes of contrast, I took speci-

(Testimony of J. M. Kniseley.)

cations from a reference in preparing Exhibit 27. From my general knowledge, I know these materials distill at low temperatures.

Comparing the results of my tests with specifications shown on Exhibit 25, I found the specific gravity to be .95. That is approximately what appears in the specifications as A.P.I. gravity as they are the same things expressed on different scales.

Pounds per gallon at 60 degrees is just expressing specific gravity with another set of figures, and the specifications compare very closely with what I found in my tests.

On viscosity at 212 degrees Fahrenheit, there was a very substantial discrepancy from the figures shown on Exhibit 25. It took four and a half or five times as long for the material to flow through a standard piece of equipment. I have marked my initials on Exhibit 25 at this item, it being the first substantial discrepancy.

As to flash point, the minimum fixed in Exhibit 25 is 80 degrees, there being no maximum, and my finding was 91.

Coming to distillation, I don't know what material is referred to in A.S.T.M. specification D-402-36 as set forth in Exhibit 25, but I think it is one of the cutback asphalts. It is not the standard I used. I have placed a mark around that item. [136]

The distillation per cent by volume at 437 degrees of a minimum of 23 per cent and maximum of 30 per cent compares fairly closely with my tests.

(Testimony of J. M. Kniseley.)

I did not test the per cent distilled at 500 degrees, but picked it up again at 680, and got about the same percentage as indicated in the specifications.

The only test I made on residue from distillation was the penetration test, and I got 36, between the maximum and minimum, which is a fair contrast.

On the next page of the specifications, Exhibit 25, I made the test on softening point and got about the same as indicated in the specifications. I made no tests on penetration, ductility or oliensis spot test.

Relative to the tests on the solvent portion, I did not determine either the A.P.I gravity or the specific gravity, nor did I test pounds per gallon. Initial boiling point I found to be as reflected on Exhibit 27, together with percentages and temperatures.

To summarize, I found it took about four or five times as long for the material to flow through a standard orifice as specified in Exhibit 25; that the solvent had an initial boiling point of 122 degrees, as contrasted to 190; and an end point of 320, as contrasted with 450.

(Noon recess.) [137]

2 o'clock p.m., Thursday, April 29, 1954.

J. M. KNISELEY

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination (T489)

Pursuant to request, I obtained the amount of permissible deviation between tests of flash point from the manual of A.S.T.M, and it is 5 degrees for the open cut flash tester; between two testers, it is 10 degrees. The variation of 2 degrees for one operator and 4 degrees between two operators contained in the volume I showed you is for the closed cup method.

I believe the A.S.T.M would be the accepted standard and I have that volume available. It refers to the Cleveland open cup method at temperatures of 175 or over. I don't have anything that refers to temperatures of less than 100 degrees in the open cup.

Again referring to the result of my tests as contrasted with the specifications contained in Exhibit 25, I have marked on Exhibit 25 with a circle and my initials those items where tests were made by me and a decided variance was found.

I stated on direct examination I found fault with the attempt to heat the primer by the workmen but not with [138] the procedure followed. In a general way, I am familiar with the various methods of heating roofing preparations; that they are divided into the cold category, which may be ap-

(Testimony of J. M. Kniseley.)

plied without heating, and the hot category, which means it has to be heated before application; that the cold types have lower flash points than the hot types of roofing; that the hot types usually are solid, such as tars, with high flash points; that these flash points usually run from 350 to 400 degrees; and that the amount of distillate which can be taken off the hot type is small compared to the cold type.

It is true that two items which I feel make the primer in question most dangerous, namely, low flash point and high percentage of distillate, are lacking in the hot type asphalt. I don't think it is exactly correct that in heating the hot application, the universal practice is to place the material itself in a container which excludes any possibility of the flames or any part of the flames coming in contact with it; nor do I agree that the heating appliances themselves are electric, steam or kerosene, and, if it be kerosene, that they are completely enclosed so they cannot come in contact with the material in the receptacle. There is an awful lot of careless operation of tar pots. I think it is true they have a lid as a smothering arrangement to cut off any fire that may come into the material. [139]

To say whether or not it was a very great exposure to hazard to place two containers comparable to Exhibit 22 on top of a barrel stove, where there was no protection of any kind between them and the flames or coals underneath, particularly since these buckets had holes drilled through the sides

(Testimony of J. M. Kniseley.)

with wire inserted in place of bails, the containers being partially filled with any petroleum product, would embarrass me a great deal, because I don't want to have anybody ever get hurt according to anything I say.

But, actually, you would have an awful time setting a pot of cold roofing afire in that bucket over a stove if there was any distance at all from the flames. Even with temperatures generated of around 600 or 700 degrees Fahrenheit, I don't think you would get it afire.

I am not certain that it is prohibited by safety regulations, municipal ordinances, and so on, to heat any kind of roofing material inside a building.

If the workmen had employed the same heating apparatus with a hot roofing material, I don't think they would ever have got heat enough to apply it on a roof. 400 degrees would be sufficient to cause the hot application to become liquid, but in the ordinary tar pot those temperatures are around 1,500 to 2,000 degrees. That is the temperature inside the fire tube where the flame is under a draft. [140]

Redirect Examination

(T500)

As nearly as I know, all temperatures that have been referred to this morning have been Fahrenheit.

(Testimony of J. M. Kniseley.)

(It was stipulated by counsel that all temperatures previously referred to were in the Fahrenheit scale.) (T500)

The Fahrenheit scale is the one on which newspapers give readings of outside temperatures, and so on.

From my observation of the barrel from which my sample was taken, I would say that the barrel had never been hot, because the label was intact, the outside of the drum showed no evidence of heat, and there was no puffing of the head. I would say that the maximum temperature the barrel had ever been exposed to was 130 degrees.

No exposure to normal temperatures would change the waterproofing qualities of this primer. Petroleum products will crack with excessive heat. As far as primer is concerned, its purpose is to form an adhesion between it and the upper coat, and it isn't required to have waterproofing properties and doesn't have to any extensive degree.

(Objection to the question: "And directing your attention to those specifications, Exhibit 25, assuming a manufacturer prepared the roofing material in accordance with those specifications, would that material be a dangerous material?" on the ground that was not plaintiff's theory [141] of case; overruled.) (T502-503)

The manufacturer could adhere to this specification and it would still have been dangerous, still be subject to causing explosions at normal atmospheric temperatures.

(Testimony of J. M. Kniseley.)

The reason prudent manufacturers follow the custom of placing a red warning label on drums put up for sale where the flash points are at or below 100 degrees is that is the temperature normally experienced in this climate and the intent is to have the materials always above the temperature at which it is being handled.

I have been in attendance throughout the trial and have heard the testimony of Tom Woods, Ira Hoskinson and other witnesses as to what happened. It is my opinion that:

“They had this material in this single bucket that was on the fire at that time and it was warmed up to a point where he soon would be ready to take it up on the roof, which, judging from the things they have said about it, should have been somewhere around a temperature of 110 degrees Fahrenheit, at which point it would be giving off considerable quantities of this gasoline vapor, and these gasoline vapors are heavy, they boil out, and if you hold them up to the light, you can see them, and they boil out and if there is any currents of air coming from the heat, they go up. That condition had probably been going on a good share of the morning, but for some reason, at that one time, those billows of vapor came in contact with some source [142] of ignition. Nobody knows whether it was a static spark or somebody threw a match down that hole, or nobody knows what caused that. Normally, they would go up with the heat underneath them. So they ignited and they flashed.

(Testimony of J. M. Kniseley.)

“You realize that there wasn’t such a tremendous quantity of them. They are very potent, but there wasn’t too much of them, so they flashed and this initial flash that this gentleman driving down the road saw was the combustion of those vapors. The air disturbance and the temperature created by that then stirred up all the dust and all the particles in that building until they then went into the air and became into an explosive condition themselves, and that fire then flashed across the ceiling and these men described it as billowing in the ceiling. Then the next description that I recall is that they looked in there and some of them could see flames and some of them couldn’t, mostly smoke. The air at that time was then deficient in oxygen, there wasn’t enough oxygen to burn, but the heat was there. Everything in there was well above its kindling point. So after that, all that was necessary was for air to come through and the building was gone.”

In my opinion, I am certain it was the ignition of the vapors and not of the surface of the fluid itself.

It is my opinion that the manufacturer should have placed a warning label on the drum containing this primer. [143]

Recross Examination

(T507)

I have had quite a lot of experience and have been employed numerous times to determine the

(Testimony of J. M. Kniseley.)

cause of fires. About 10 or 15 years ago, I was called down to Auburn when the big government warehouse burned. They were using asphalt as an adhesive to put the cork on the wall. Since that time, I have had maybe 15, maybe 25, similar employments.

(A discussion was had before the bench between Court and counsel, out of the hearing of the jury, in which defendant advised Court he proposed to go into the background of employment of witness to show he was habitually employed by fire insurance companies to attempt to attribute losses to someone other than the owner of property.

Plaintiff objected, stating this would open the whole matter of insurance; that plaintiff would be entitled to show he was under-insured; that witness was employed by plaintiff and not by an insurance company in this instance.

The Court ruled that defendant might inquire as to witness' employment in the instant case to show bias, and that other objections would be passed upon as they arose.) (T508-510)

I stated that in the last 15 years, I had been employed to investigate the cause or origin of some 15 or [144] 25 fires; that I didn't recall exactly what the number was. On a share of them, I have been employed to make those investigations for the purpose of determining general safety standards.

(Objection to the question: "Basically, what you have attempted to do in each one of these instances of employment is to attempt to fasten the liability

(Testimony of J. M. Kniseley.)

on somebody that there might be a recovery by some corporation or individual for the fire loss, isn't that correct?" on the grounds of irrelevancy, immateriality and incompetency; overruled.) (T511)

That isn't exactly correct, because the way I got started at this business was that I was employed by I. F. Laucks, Incorporated, an associate of Laucks Laboratories, and they asked me to make a complete investigation to find out whether they were justified in going into the solvent extraction business. For some two or there years that was the major part of my activities. That must have been about 16 years ago.

I. F. Laucks, Incorporated employed me in the majority of the investigations I have made. They put out a variety of products and I was doing the research work as far as inflammability was concerned for them. Excluding I. F. Laucks, I have been employed by attorneys. I have received checks for my employment both from attorneys and from [145] some type of organization behind the attorneys.

(Objection to the question: "And what is the type of organization that employs you to do this work?" as being improper; jury excused, and a discussion followed between Court and counsel. (T514)

Plaintiff stated question was improper cross examination, an attempt to inject highly improper and prejudicial matter before the jury.

The Court stated that counsel was too astute not to know where the inquiry was leading; that a

(Testimony of J. M. Kniseley.)

Federal judge has the right to comment on the evidence, and that if unfair advantage was taken, the Court would do its best to keep the balance even and point out to the jury what is being done; that the Court did not consider it fair to bring out what was attempted to be elicited; that if plaintiff brought out comparable matter, it would be a mistrial.

Defendant stated if Court felt the matter improper, it would not be pursued further; that defendant believed witness has been habitually employed by fire insurance company in the Pacific Northwest for the purpose of making investigations of fires to determine if there wasn't some possibility of recovery; that a man so employed must, of necessity, have a certain amount of bias, and this would be a proper matter to show in the record.

Plaintiff advised the Court he felt what witness [146] might have done in past employments had nothing to do with his present bias; that inquiry as to terms of employment in instant case would probably be proper; that the damage, in large measure, was already done.

The Court ruled defendant might inquire into circumstances and terms of employment in this case; that defendant could show how much he had been employed and on what type of case to test qualifications.

Defendant advised that wasn't his objective and that he would let the matter stand.) (514-520)

To the best of my knowledge and belief, I believe

(Testimony of J. M. Kniseley.)

the specifications called for in Exhibit 25 would fit into the category of a standard roofing primer.

LEONARD L. BURGUNDER

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

(T521)

I reside at West 806 - 16th, Spokane, where I have lived 11 years. My occupation is Deputy State Fire Marshal, employed by the State of Washington, and have been so employed 11 years. Prior to that, I had a general insurance business in Colfax, Washington, where I was City Fire Chief for 13 years.

In my experience, I have done quite a little investigating of fires, particularly those of explosive [147] origin, to determine their cause. I have also attended fire colleges since 1929, where fire control and fire prevention are the major subjects, and they also go into how these fires get started. I feel that I have knowledge beyond that of the average layman as to the causes and origins of fires and fires of explosive origin.

(Motion to strike answer relating to witness' opinion of his qualifications as not qualifying him; motion granted.) (T523)

(Objection to the question: "Mr. Burgunder, in this case there has been testimony that certain material was being heated over a stove of coals in

(Testimony of Leonard L. Burgunder.)

which some apple wood had been permitted to burn down and it was in pails about three-fourths full, and that chemists have testified that this material had a flash point between, I believe, 81 degrees and 91 degrees Fahrenheit, and the testimony is that this heating had been carried on with buckets of this material from about ten o'clock in the morning until somewhere around a quarter to one in the afternoon; that it was in a room 50 by 160 feet in dimensions, with a concrete floor, the barrel being located near the center of the room, that is, the buckets that were being heated, and that several of the doors were opened and there was a rather brisk wind blowing outside, and the man that was there had his back turned to the stove on which this material was being heated and [148] had walked away possibly 15 or 20 feet when he heard a violent noise, I think he described it as a 'whoosh,' something like that, and at the same time a man driving towards the building, who had a view directly through the open doors to this room, said that one instant there was nothing and then he saw a brilliant, very brilliant flash of reddish, orange color and within a minute thereafter this entire large room of 50 by 160 feet with an 18-foot ceiling was entirely enveloped in flames; what, in your opinion, occurred there?" on the grounds it relates facts assumed to have existed and in part relates or refers only to testimony of certain witnesses; secondly, as a hypothetical question, it does not include in the hypothesis all the facts which

(Testimony of Leonard L. Burgunder.)

existed and in part misstates facts which are established by the evidence; that it is not properly framed.

There was added to the question: "Well, there were at least two doors open then to the outside from this room, and, furthermore, the outside temperature was in the vicinity of 90 degrees and, furthermore, assuming that after this man that was in the room heard this violent noise, he turned around and immediately saw approximately half of the ceiling of that entire room a mass of flames billowing down, and also when he first turned around there was no flame around the stove or the pails which were on the store, all of the flame he saw when he turned around was billowing down [149] from the ceiling; now can you express an opinion as to what happened?" Objection renewed as improperly framed and incomplete; overruled.) (T523-527)

From the description, I would say you had a flash fire caused by the suspension of flammable vapors in the atmosphere. There was evidently some residues on the ceiling that made the fire continue to burn, such as dust or the wood not painted or splinters out of the wood, to sustain the fire. It was not the substance that burned itself, it was the vapors that come off that burned. These vapors get in suspension in the air and evidently were ignited from some source or other and caused what we call a flash fire. Ordinarily, a flash fire is very terrific, considerable noise, considerable air cur-

(Testimony of Leonard L. Burgunder.)

rents, and if there is sediment on the ceiling and walls, dust of any type or splinters, that begins to circulate in the air also and makes the fire that much hotter and keeps it going.

In my position, I am familiar with national and state regulations having to do with the labeling of petroleum products put up for sale to the public of certain flash point or all flammable liquids.

(Objection on ground standard not named; overruled.) (T529)

The standards I have referred to come from, first, the National Fire Protection Association; the other one is [150] the National Board of Fire Underwriters. If my memory is correct, that standard calls for labeling of containers put out for sale to the general public with flash points below 150 degrees.

Cross Examination

(T531)

As I understand it, the National Board of Fire Underwriters is a group of fire insurance companies, a non-profit organization, which through experience and testing and their cooperation with the Underwriters Laboratory in Chicago, has set up certain standards. They work in conjunction with the International Association of Fire Chiefs and Firemens Association. I am not a member of the National Board of Fire Underwriters. They put out pamphlets from time to time, as does the International Association of Fire Chiefs, of which I have been a member for a number of years, on

(Testimony of Leonard L. Burgunder.)

various hazards that are developed through new developments in industry and sciences. The National Fire Protection Association is a group of manufacturers and business men working in conjunction with the fire service. I am not a member of this organization.

I believe I have publications setting forth the standard I have mentioned in my office. I would imagine the classification calling for a warning label below 150 degree flash point would include material to be applied to the exterior of a roof. It depends on what the roofing material [151] is made out of. I think you will find roofing material put out in rolls that carries the Underwriters' label. I think you will find there are other roofing materials that do not carry the label, but still the insurance companies give a credit for it because it will not set fire with a spark.

(Motion to strike portion of answer dealing with different types of roofing materials granted.)
(T533-534)

We would classify as flammable either solid or partially liquid asphalt for application to the exterior of the roof of a building. I am not sure what the flash point of any particular roofing material is. My knowledge of the fire hazard in connection with asphalt roofing materials comes from practical experience and what I studied. The 150 degree flash point regulation does not say what kind of material it refers to. I think I have the regulation in my office. The reason I didn't bring it with me

(Testimony of Leonard L. Burgunder.)

is that I didn't know what question would be propounded to me.

I don't think the recommendation of the National Board of Fire Underwriters says anything about asphalt or any other product; it simply says any flammable liquids, that they should have a warning label on them. It would depend on the consistency whether asphalt roofing material for application to the exterior of a roof would be classified as a liquid. Some roofing is different from others, I think, and [152] I think some is thinned down in various ways. I don't know what degree of viscosity it has to have to be classified as a liquid.

I would say that the specifications read to me from Exhibit 25 might apply to a chemist that has knowledge of that. That is why we of the fire service depend upon the National Board of Fire Underwriters and the National Fire Protection Association to tell us what materials, not always specific gravity and all this other stuff. We are firemen, we are not chemists. If the flash point of this material is under 150, I would say it would ask for a label on it. The rules that I have read from the two organizations do not specify whether it was cold or hot roofing material. Anything that has a flash point under a certain degree is what they recommend.

I would hardly think this rule was merely a recommendation among fire insurance companies. It is put out so that the ordinary layman will also

(Testimony of Leonard L. Burgunder.)

know what precautions to take when he uses certain products.

These reports are sent to me in my capacity as Deputy Fire Marshal and also as a member of the International Association of Fire Chiefs and International Association of Arson Investigators. I have bulletins from International Association of Fire Chiefs in my office, but I did not bring them with me. I don't recall whether these bulletins contain [153] any reference to a cold roofing material for application to the exterior of roofs. I think I have bulletins from the National Board of Fire Underwriters referring to flammable liquids and materials, but not to asphalt roofing.

(Whereupon, plaintiff recalled and called witnesses on the subject of damages (T545-968), during which testimony certain references were made to liability aspects of the case, as follows:)

RHEA ROSENBAUM

testifying on behalf of the plaintiff.

Cross Examination

(T921-927)

I have heard testimony as to the loading dock on the south side of the warehouse; that there was a concrete section outside of each doorway and the same size as the door. The rest was a wooden platform which extended between all the docks the entire length of the building. I believe the concrete platform outside each door was 6 feet wide. The

(Testimony of Rhea Rosenbaum.)

wooden platforms were all burned out in the fire.

I didn't make any particular check after the fire as to the barrels of roofing which had been out on the loading dock to see what became of them. Insurance agents were there and various other people and I didn't particularly. Part of the barrels were standing on the wooden dock which burned and they fell to the ground. I believe that is also [154] true of the primer.

I believe my attention was first called to this one barrel of primer which was saved by Mr. Cashatt and Mr. Williams several days after the fire. I had not talked with Mr. Segerstrom about it and had not met Mr. Cashatt or Mr. Williams prior to that time. I had been told they were representing Mr. Segerstrom. At their direction, I hauled the one barrel away. There were two other barrels with the bungs out that had a little bit left in them. We also took those down to the place and I believe they are still there.

As to this one barrel of primer which was saved, I don't remember the plug being out. It has always been in according to my recollection, but I probably am not positive about it. I just don't remember it being out.

Three of the six barrels of roof coating were also on the platform and in the fire. The barrels had not burst but they were all turned over and their contents had run out. The other three barrels of roof coating were on this little concrete dock,

(Testimony of Rhea Rosenbaum.)

I believe. I don't believe we saved any of it and I don't know what became of the barrels.

It was within a few days, four or five days or a week after the fire that Mr. Cashatt and Mr. Williams came out. I couldn't say how many people examined this material or these barrels because I was only there at times, but there were other people there. It was five days to a week later [155] that I took the barrel down to my house and placed it under a machine shed where we keep the machinery, which is located about 300 or 400 feet from the house. I don't recall very many people examining the barrel at my place except Mr. Williams and someone taking samples. I gave it no particular attention or care as I hadn't been given any instructions, only to put it under the shed.

Redirect Examination

(T929)

The drum of primer from which the samples were taken was sitting on the concrete loading dock. It did not fall off down on the ground, but was still sitting on the concrete dock.

Plaintiff Rests

(T968)

(Defendant moved for dismissal as follows: "At this time, the plaintiff having rested, the defendant moves that a judgment of dismissal be entered, for the reason that under the law and facts the plaintiff is not entitled to recover.

“I particularly call the attention of the Court to the fact that this plaintiff had an instruction book, which he did not give his employees, which told him and them in plain letters to not heat or thin Battleship, to which he [156] paid no attention.

“Secondly, his men were using it in a manner which was never intended, quite apparently, by the manufacturer; namely, they were heating it over an open fire; and, third, that there has been no sufficient competent evidence of damages sustained by the plaintiff to put the defendant on its proof, because they have simply put in the estimated cost of erecting a new building. They made no effort to erect this new building, didn’t even secure bids on it, and I am making that motion.

“I know the hour is getting late and I am getting tired myself and I know your Honor is. I think it is well taken, frankly.”

The Court ruled:

“I think there is a question of fact for the jury here. I will deny the motion. I might say that I will consider it both as a motion for dismissal and for directed verdict. I think it would be sufficient to make either, but it will be so considered and it will be denied.”) (T970-971)

Defendant made an opening statement to the jury. (T971-977) [157]

BOB SORBY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T977)

My name is Bob Sorby; I live in Spokane; I am self-employed, I do different kinds of work, cement work, gardening, landscaping, a little of everything. I work for St. Joseph's Parish Catholic Church and have off and on for 10 years. I do quite a bit of painting for them and act as sort of a handyman in my spare time.

I put some Battleship roofing primer on the convent over there. The material was received in either June or July of last year and was ordered by the Pastor. I didn't put it on until October when there was a rain and the roof leaked. I had planned a hunting trip to the Coast and was not working at the time. The primer had been kept outside during the summer, but had been in the basement for a month prior to using it. We had a 55-gallon drum and a 20-gallon drum of primer and also some of the roof coating.

(Objection to question as to whether there was difficulty encountered in drawing material from material on ground of no showing primer came from same batch as plaintiff's primer; overruled.) (T980-81)

We had no trouble drawing it out of the barrel. It did flow rather slow, but it did flow freely out of the barrel. [158] We wanted to put the material

(Testimony of Bob Sorby.)

on thicker than usual because they don't generally re-roof those buildings only every 10 or 12 years, so we used a large rubber squeegee. We were going to use a brush and tried it, but it was a little slower and we were in a hurry to go hunting.

We covered three roofs, one of which was 40 by 60, I believe, another one was probably 50 by 60, and the large building was 100 by 40, or something. It rained one day while we were doing this and we suspended operations then.

Cross Examination
(T983)

We used the stuff the wrong time of the year. October is not the right time of year to do roofing and it was cold, because the barrel set outside during the day and overnight when we were using it. In the mornings real early it was a little thicker than usual, and towards evening you might have a little trouble brushing it out. But we used a brush on the asphalt coating and that is heavier, and we had no difficulty. We used the squeegee because we wanted it a little thicker.

FRANK L. LYMAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination
(T984)

My name is Frank Lyman; I live in Spokane; I

(Testimony of Frank L. Lyman.)

am the engineer for the Carnation Company. [159]

My duties include looking after the maintenance of a building about 100 by 150.

In February or March of 1953, I purchased some Battleship primer and Battleship roof coating, and used it about June.

(Objection to question as to whether witness read instruction book as wholly immaterial; overruled)
(T985-986)

I read the instruction book. In the case of the primer, I don't remember whether there was any particular odor to it as we used several kinds of roofing.

Before we applied the material, we had it down in our shop down in the basement. We just used it for patching on an area about 20 by 20 foot. We used one of these cleanup brushes we have with a stick or handle on it to apply the primer. We had no difficulty in brushing or spreading it or in pouring it from the barrel.

Cross Examination

(T987)

I got a 15-gallon drum of primer and 15 gallons of the finish coat. I bought it from a salesman, but I don't remember his name. We might have a little of the primer left, but I think we used most of it. I didn't put any of the material on myself, but I was up on the roof most of the time it was being done. It didn't take too long to put it on. That doesn't go on very hard, just like mopping it on.

(Testimony of Frank L. Lyman.)

[160] I was up there until they got the first coat on all the time.

We kept the material in our shop in the basement before applying it. It is really the ground floor, but we call it the basement. The boiler room is on the same floor as the shop, but it is outside the building, 75 or 80 feet from the shop. The boiler runs all summer, but I doubt whether you get much heat from the boiler in the shop. It is warm enough in the basement in the summertime, anyway, as far as that goes. There is a compressor room between the boiler room and a kind of an alley, about a 20-foot alley.

We took the material up on the roof before we started and it sat in the sun awhile. We might have taken it up the day before and applied it the next morning. It was a hot day when we put it on. I don't know whether we started in the morning or afternoon.

Redirect Examination

(T993)

This material was kept 75 or 80 feet from the boiler room.

BOB SORBY

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination

(T994)

When I opened this drum, I detected a definite [161] odor. At first when I noticed the odor, I

(Testimony of Bob Sorby.)

thought it was tar, but it was like a tar odor or something like a petroleum odor.

Cross Examination

(T994)

We put the primer on two roofs, one was about 40 by 60 and the other 45 by 60. They would be considered flat roofs. They sloped to the middle for an inside drain. We used 75 gallons of primer and there might have been another 10-gallon drum, I can't remember exactly. I think it was possibly 90 gallons in all.

RALPH E. SEXSMITH

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T996)

My name is Ralph E. Sexsmith; I live in Spokane and have for 50 years; and I am employed by Washington Machinery & Supply Company as a purchasing agent, timekeeper and building maintenance man.

About March of last year I bought some Battleship products and they were delivered about the first of June. I helped apply it about two weeks later. We used a roof brush, bristle brush, to apply the primer. When the primer was opened, I noticed a petroleum odor.

I left the material out on the back loading dock

(Testimony of Ralph E. Sexsmith.)

in [162] the sun. If it was a cool day, it wouldn't run, but leave it out there in the sun and as soon as the sun warmed it up, it was okay, run fine. We didn't have any trouble spreading it on the roof. We used about five drums of Battleship and about one drum of primer. I read the instruction book which I received before we applied the material.

Cross Examination

(T998)

We just covered about 60 squares with the primer that we thought needed it. The material was on the loading dock where it was unloaded for about two weeks, which is on the south side of the building with no roof, so it was exposed to the rays of the sun. We applied it from about the middle of June up through about the middle of July, depending on the weather. There was days it was pretty chilly and you can't work a roof when it is cold. If the sun was right, and so on, we was working. On a cool day, the material would run very slow from the barrel, which is the reason we didn't use it on a cool day. We waited until it was a hot day and until the material had been out in the sun for some time and then it came out all right.

ED NOBLE

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1001)

My name is Ed Noble; I am staying at the Community [163] Hospital out east of Spokane where I am working doing the chores and janitor work around there. I am 70 years old.

In June of last year, I received two barrels of Battleship primer and three barrels of roof coating and applied the primer around the last of June or the first of July. We put it on the hospital and gym. The hospital formerly was Spokane University. We waited about a month and then applied the top coat in August.

I didn't pay much attention to the odor. It had a little bit but not much that I could notice. I did not have an instruction book that came with it. I used brushes to put it on and had no trouble spreading it or drawing it from the barrel.

Cross Examination

(T1004)

The roof on the hospital is flat and the gym has a sloping roof. I used a block and tackle to pull the material up the outside of the building on the hospital. On the sloping roof I had a jack up there and pulled it up with a block. It was real warm weather when I was putting this primer on. It didn't run too slow from the barrel.

I have been a roofer for Montgomery & Ward for

(Testimony of Ed Noble.)

three or four years and I guess I have used close to 150 barrels of Battleship and Ward's together. I have used both kinds when it was pretty cold. If it was warm weather, we always set it out where it would be the warmest place. [164]

I had no trouble at Community Hospital in spreading it. The material had set outdoors and it was plenty warm enough. I started putting it on early in the morning. I put Battleship on the hotel at Chewelah in the fall and spring when it was cold and I had some trouble there. On several occasions we used fuel oil to mix in with it, cut it like turpentine would paint. We used kerosene to thin the primer when we couldn't get distillate.

Redirect Examination

(T1008)

Some roofers, I know, thin asphalt roofing with fuel oil when it is too stiff to spread. I never worked with any other bunch. We found out that would thin it and that is what we used. We know it is made of oil so we put another oil in it. It smells like oil.

HERBERT C. MANTHEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1009)

My name is Herbert C. Manthey; I live in Spo-

(Testimony of Herbert C. Manthey.)

kane and have since 1914; I am maintenance man for Inland Motor Freight, where I have been employed 10 years.

Under my supervision are all the buildings of the company on the west side of Idaho, all of Washington, and part of Oregon. There are a considerable number, but I couldn't say just how many there are. They are the buildings [165] used for freight houses at the different depots.

I can't recall just when we got the Battleship primer and roof coating, but I was told we had quite an amount of Panther roofing at Walla Walla which we were to use on our buildings. I used a little over 15 gallons of a 55-gallon barrel on the Pullman building in June of 1953, and the remainder of it on the Lewiston, Idaho building in the latter part of September, finishing on the 2nd day of October. I don't know just when the material was purchased.

I did the work myself to get acquainted with the job and had no trouble whatsoever in spreading the material or drawing it out of the barrel. There is more of an odor to it than the ordinary asphalt. It has a petroleum smell.

Cross Examination

(T1012)

I used a 55-gallon drum and a 15-gallon drum of the primer. This was my first experience with Battleship. I know nothing about the purchase, but I presume it was made by the purchasing agent.

(Testimony of Herbert C. Manthey.)

I put the 15 gallons on at Pullman myself in June. I didn't leave the barrel out in the sun before I started using it. If I remember offhand, the building there is 50 by 60. The building at Lewiston is built like a "T". I think it is 136 or 38 feet long and one side of the building has an offset of 30 by 60, I believe, and then the office is 30 by 36, and I used the primer on the office part and over the [166] other offset.

Redirect Examination

(T1014)

I received an instruction book and read it before I applied the material.

JOHN SNYDER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1015)

From 1914 to July, 1952, I was in the roofing contracting business in Spokane, operating under the name of Snyder Brothers. I sold out in 1952.

I am familiar with hot and cold roofing applications. Hot application is what the roofers term hard asphalt. We were not very much concerned with the flash point, but on the few occasions when we had a chemical analysis made of it, it would run from 450 to 500.

Hard asphalt has to be heated to a temperature of anyway from 300 to 450. It is used in the con-

(Testimony of John Snyder.)

struction of new roofs and the asphalt is so heavy it has to be heated to the point where it will properly spread to apply it. To heat it we used an oil-burning kettle with tubes submerged in it which are heated with a high pressure torch, and there is a little pot or little well-like place that the torch sits down in. [167]

Defendant's Exhibit 46 for identification shows three different types of kettles, but they are all the same as far as the heating part of them is concerned.

Defendant's Exhibit 46 admitted. (T1018)

(The witness was temporarily withdrawn.)

A. GUNNAR ERICKSON

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1019)

My name is A. Gunnar Erickson; I am engaged now in operating my own business under the name of the Spokane Testing Laboratories, and I have been so engaged in Spokane for approximately a year and a half. Prior to coming here, I worked for the Navy Department on the Coast for approximately eight or nine years as a chemist, and prior to that I worked in the mining and metallurgical fields in laboratory work. I have had approximately two years of college courses, but I do not hold a degree. The testing that I have done is

(Testimony of A. Gunnar Erickson.)

a matter of practical experience and from practical testing.

Pursuant to request, I conducted certain tests to determine the heat generated by an apple wood fire, and I have with me the records of those tests. I made a barrel stove out of a 55-gallon drum, an ordinary 55-gallon exchange drum, and I had it cut so that it had an opening at the top [168] copper alloy; in other words, it is a form of thermometer very commonly used in industry and laboratory work.

I used water in the containers in my test, and I believe I would get a lesser temperature than if a heavy viscous material had been used, because of the water attaining a maximum temperature of 212 degrees.

You see the thermocouples extending out here on Exhibit 47 and they extended inside halfway distance of the bucket and were approximately an inch below the bucket, and here are the leads leading to my indicating pyrometer. A pyrometer measures the current that is generated. It is an electrical way of measuring temperature. I recorded the temperature generated under each of the two buckets.

After starting the fire with the kindling, I put in the apple wood and took an initial reading 10 minutes after it was burning, and from there on I took readings at 5 minutes, switching from one thermocouple to the other and getting the temperature underneath both buckets.

(Testimony of A. Gunnar Erickson.)

Defendant's Exhibit 49 for identification is a graph showing the temperatures in relation to the time during Test A, the first test I ran. The graph in blue reflects the temperature readings taken of the bucket to the front of the stove and the one in red those taken underneath the rear bucket. The column on the left-hand side of the exhibit indicates degrees in temperature on the Fahrenheit scale; the [169] approximately two feet by one foot when in a horizontal position. Then at the back near the top I cut a three and a half inch hole and then at the front there was approximately a 12 inch circular opening for charging the stove. This was done in the early part of February of this year.

When I started my test, I obtained some kindling wood to start the initial burning, and then I had some dry, unpeeled apple wood. When I first started, I used four pieces of one inch by two inch diameter and three pieces four inch to six inch diameter, approximately 30 pounds of apple wood.

Defendant's Exhibits 47 and 48 for identification are photographs of the stove that I referred to.

Defendant's Exhibits 47 and 48 admitted.
(T1023)

Exhibit 22 is substantially the same type of container that I placed on top of the barrel stove referred to in Exhibits 47 and 48, and there was room for two of these on the stove.

Before I started my fire, I had two thermocouples

(Testimony of A. Gunnar Erickson.)

in place underneath the two buckets approximately one inch below the bottom of each, and these were connected to an indicating pyrometer so that I could switch to either thermocouple and take readings of the temperature any time. A thermocouple is a tube of two dissimilar metals. In this case I used iron to constantan, which is iron and a nickel-column [170] at the bottom indicates time in minutes.

Defendant's Exhibit 50 is an identical graph, set up in the same way, except it shows the readings taken during Test B, which followed Test A.

Test A, I started the fire with apple wood and it continued for 135 minutes. At the end of that period, I had low coals, and then I put my second charge of apple wood in and started Test B. In the second charge, I used five pieces of one inch to two inch diameter and two pieces four inch to six inch diameter, approximately 32 pounds of apple wood.

Voir Dire Examination

(T1028)

I started the fire and began taking temperatures after 10 minutes, initially. The fire was burning briskly at the beginning. As time went on, it tended to start burning down to coals. I would say it took approximately 100 minutes to 105 before it was entirely coals and there was no flame. In Test B, I had a very low fire or coals at 135 minutes. In that

(Testimony of A. Gunnar Erickson.)

test there were some larger pieces which kept flaring up a little bit.

The lower curve plotted in pencil on Test B are readings I took from a thermometer hung between the two buckets approximately halfway down from the top of the buckets.

Defendant's Exhibits 49 and 50 admitted.
(T1031) [171]

Direct Examination—(Continued) (T1031)

The thermometer between the buckets is shown in Exhibit 49. That took the temperature of the air a few inches below the top of the two buckets, as contrasted with the temperature taken at the bottom of the buckets by the two thermocouples.

I believe 55 is the beginning of the test on the vertical graph of Test A. The peak temperature under the rear bucket of 950 degrees was reached in 20 minutes. There were fluctuations in the fire which account for the rises in temperature.

At the end of Test A, I stoked up the fire and placed the second charge of apple wood right on top of the coals, and that is what is indicated in Test B, Exhibit 50, as the beginning of the test. The two tests show the inception of the fire; at the end of 135 minutes the building of the fire again and the new charge and the final running down of that.

As I said before, it took about 105 minutes in the first test to get down to a bed of coals. There might have been a few small flames at that time, not high

(Testimony of A. Gunnar Erickson.)

flames. I wouldn't say there were constant flames for 105 minutes, because the pieces of apple wood were pretty good sized diameter and they wouldn't burn briskly, they burn around the wood. At times, it would flare up a little bit and spark. [172] After 135 minutes in Test B, I had mostly coals, but some burning, because there was one large piece of about 6-inch diameter that kept burning for a considerable time, small flames.

Cross Examination (T1036)

These tests were conducted in my laboratory located on the premises of the Spokane Steel Foundry. I have my laboratory in the foundry building, which is constructed of concrete blocks with a concrete floor.

A wooden sawhorse with composition boards of some kind are shown in Exhibits 47 and 48. On the extreme left side of the picture is shown the wall of the building, which is of frame construction, that particular end of the building. I would say the barrel stove was 15 or 20 feet away from this wall, which I thought was a safe distance. I felt I was far enough removed from anything combustible, that I was far enough away from that frame wall and sawhorse, so there was no danger.

I conducted no controlled tests with other kinds of wood, but I ran a preliminary test with some regular wood to get an idea of what temperature ranges I would get. I can't say definitely how apple wood compares with any other wood.

(Testimony of A. Gunnar Erickson.)

The temperatures shown on the graphs have no relation to the temperature of material inside the buckets, but reflect the temperatures of the thermometer directly [173] exposed to the flames.

I couldn't say offhand how hot the plate is on an ordinary electric stove.

It is true that the amount of heat and the duration of a fire depend upon the size of the sticks and just how hot a fire you get going in the stove.

A little flareup in some of the burning embers probably accounts for the upsurge on both lines of Test A between 100 and 112 minutes. I had some flames at 105, but at 115 I had all coals. There was nothing but coals at 135 minutes, but there were sufficient to start the fire again with them. From about 136 minutes on up to 225 minutes, I still had coals.

Redirect Examination (T1041)

I did not put any petroleum products inside the buckets during the test, I used water. They melt steel in an electric furnace in this building, and I did not feel I was taking any undue risk, as there is hot metal all around that building.

Recross Examination (T1042)

I imagine there are fires of various sorts maintained in many buildings in different industries.
[174]

JOHN SNYDER

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued) (T1043)

It is quite a difficult problem to explain the workings of a tar kettle unless you see one in action.

Exhibit 46 shows the tank or container where the hard asphalt goes. This is the fuel tank and this is a hose that goes from the fuel tank into the burner. This tank is approximately 5 feet in length and 2 feet in width, oval bottom. These two little stacks projecting up maybe a foot above the kettle is the outlet of the fuel after it is exhausted. Right here is a little well that is encased all around with metal and extends down to the bottom of the kettle. That is where the high pressure burner sits, which is fed from fuel from the tank, either coal or oil stove, and that burner feeds at high pressure, more like a torch. It blows into a heavy iron tube that extends from the burner clear to the end of the kettle. Then at this end of the kettle, that heavy 6-inch tube is divided into approximately two 3-inch tubes that turn around in an elbow and come back here. In other words, there are three tubes in there, one large and two small ones. Here are the outside ends of the two smaller tubes where the heat is expelled.

It is not possible for the flame to come in contact with any of the asphalt. We heat the asphalt in this sort of kettle from 300 to 450 degrees Fahrenheit, depending on the type of roof and its condition. If you get the material substantially above 450 de-

(Testimony of John Snyder.)

grees, your flash point is apt to occur. If that happens, the man tending the kettle flips a lever and this cover automatically flops down in place and smothers the fire out in less than a minute. It is a safety device.

I never saw or heard of one of these kettles being heated to 1500 degrees Fahrenheit. These kettles have thermometers to register the temperature.

When the asphalt is heated to the temperatures I have indicated, it is a liquid and it is applied in liquid form. When it is placed in the kettle, it is hard like coal.

I have never known of the use of one of these kettles inside a building where the ventilation is impaired. I don't think the city ordinance permits that. We have never done it and we have never asked the city to do it. I wouldn't consider that a safe practice, because these kettles are usually operated with the cover up and, if it should flash inside a building, you might have a fire before you could get to it to throw the cover down.

If you heat a petroleum product having a flash point of 450 degrees inside a building over an open flame, [176] you might have trouble there, because when that is heated there is a vapor comes from it. That is true of any petroleum product that I have ever used.

I have used cold application roofing. It is made in liquid form so that it is ready to be applied to built-up roofs during suited weather for a maintenance coat. We never heat the cold application. It

(Testimony of John Snyder.)

is not supposed to be heated. We use the cold roofing under certain conditions where it is a great risk to carry hot asphalt any distance. I have used the cold application all the time I was in business.

(Objection to the question: "During that time, Mr. Snyder, have you ever seen any cold application with warning labels on the container in which you received it?" on grounds of incompetency, irrelevancy and immateriality; flash point not specified; overruled.) (T1051-1052)

"No, I have never seen that."

Cross Examination (T1053)

On the cold roofing materials that I have worked with, I don't know anything about their flash points other than I know it is quite low. We are not concerned too much about flash point in our business; it is the melting point we are concerned about.

Many times I have gotten some of the cold application that was too thick to be applied. In that case, the [177] instructions on the can usually say to set it out where it will warm up. In the first place, the roofing business is more or less seasonal; we don't paint and coat roofs in wet, cold weather. This roof paint is made with the purpose in mind of its being used during suited weather when your temperature is reasonably warm, either in the spring or fall.

If it is too thick, you can either set it out in the sun for awhile or add a little thinner like I would a bucket of house paint. I should be an expert in this field; I put in 38 years at it. I know about this stuff

(Testimony of John Snyder.)

and know it has low flash points, and I wouldn't think of setting that on the stove and heating it up. As many men always as we worked, I never heard of one of them that would ever put it on a stove.

Another angle, if the material is real chilly and stiff, say your mercury is up to 70 or 80 or 90 degrees, even if it is so stiff you can hardly dig it out, you can go ahead and dip your mop into the bucket, spread it on the roof, and in 10 seconds after it hits the hot roof, a roof so hot you can't hold your hand on it, why it will warm in just a few seconds sufficient to spread.

I know that even the hot application asphalts give off vapors when they are heated, and I know that these vapors can collect and cause an explosion; that the vapors themselves can explode. The tar pots sometimes catch fire, but [178] they don't explode and blow to pieces.

I have never heard of tar pots being used inside of buildings under any occasion and, as far as I know, I don't know of anybody that has ever done it.

I know the difference between a hot asphalt and a liquid asphalt and I know there is a difference in flash point.

These tar pots do get fairly dirty in use. The type shown in Exhibit 46 is just exactly the type we bought in 1940 and I think we had the first one in town. There are several companies that makes these kettles, but the heating apparatus is just exactly the same on all of them that I have seen, even the real old ones. The common picture that is

(Testimony of John Snyder.)

seen on the street every day where roofs are being applied, they get pretty beat up and dirty and there is lots of smoke coming off. On any type that I have seen, you can't see the flames passing along the street, because the flames sit down in a well that is perhaps two and a half feet deep.

There have been a few occasions in my experience where it was necessary to haul the roofing application up to the roof through a manhole in the building, rather than up outside to the roof, where it was difficult for us to haul it up outside.

I know from my experience that the cold roofing [179] application contains some pretty inflammable stuff. I don't know how inflammable the thinner is that is used to thin out this material, because I am not a chemist and I am not an expert on that.

ENREST E. GETCHELL

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1064)

I have lived in Spokane since 1943: I am a shorthand reporter, general reporting, and was a reporter in the Superior Court in Spokane for 7 years, and have been a shorthand reporter for 31 years.

I acted as the reporter in the taking of the deposition of John Woods on January 7, 1954, and I have my notes with me that I took at that time. Mr. Woods was sworn by me.

(Testimony of Enrest E. Getchell.)

Mr. Woods was asked the question: "By noon-time, I suppose the coals had gotten pretty well down to ash, hadn't they?" and his answer was "Yes——"

(Objection on ground Mr. Woods admitted that was his testimony. The Court stated Mr. Woods either denied stating it or said he didn't remember; overruled.) (T1066)

His answer was: "Yes, Rosenbaum's brother watched the fire and built a good fire while we was gone. We had enough so we had some coals after dinner. That is the way it was." [180]

According to my notes, the next question asked was: "After you went to dinner, Rosenbaum's brother put some more wood on the fire and built it up?" and the answer was "Yes."

(Court adjourned until 10 o'clock a.m., Tuesday, May 4, 1954.)

Tuesday Morning, May 4, 1954, 10 o'clock a.m.

ETHLYN GRIMMER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1068—Vol. V)

I am Ethlyn Grimmer; I have been employed by Riverside Warehouses for 14 years; I am a member of the Grimmer family who have been in the warehouse and transfer business in Spokane for a long time. I take care of the records of the various

(Testimony of Ethlyn Grimmer.)

companies for the Riverside Warehouse, whose business is that of warehousing and cartage. They receive and distribute merchandise that is shipped in for storage by people who have customers in this community. We receive it and keep a record of it and send it out on orders from the owners of the merchandise. We have well over a hundred such customers, but I wouldn't know how many. [181]

We have in storage Battleship products from Panther Oil & Grease Company, and have had this account for approximately 10 years. The merchandise comes to the warehouse in carload lots from the railroad. Several days before a car is expected, we receive a manifest from the Royal Oil Company in Denver. When the carload comes in and is put in storage, a record is made in the warehouse which is turned over to me and I, in turn, make 4 or 5 copies. If there is damage, we make 5; otherwise, we make 4 copies. Two go to the company, one to the Royal, and one for our records and the other to the railroad. The original goes to the Panther Company at Fort Worth, Texas. The shipments come from Denver.

Defendant's Exhibit 55 for identification are the reports which are made up when each car arrives. I make up the record and after that it is in my charge.

Voir Dire Examination (T1073)

Exhibit 55 indicates all the cars received from about October, 1952 through April 15, 1953.

Defendant's Exhibit 55 admitted. (T1074)

(Testimony of Ethlyn Grimmer.)

Direct Examination—(Continued) (T1074)

The first car was received on October 8, 1952. Any shipment of merchandise which is damaged is returned to the railroad, regardless of the customer involved. [182]

Other cars of Battleship products were received on February 24, 1953; March 25, 1953; and April 13, 1953, which are all the cars that were received between October, 1952 and April, 1953. In each case where there was damaged merchandise, it was returned to the railroad.

On deliveries out of the warehouse of this material, Panther Oil Company sends out an invoice in duplicate, and from that I make a list which is on the pink sheet. That is our list which I make up every day and I use it when the auto freight gets mixed up in something. I then take the invoice, put the date that it is to be shipped, the auto freight by which it is to be forwarded, and return it to the warehouse for being filled. Defendant's Exhibit 56 for identification is the record of which I have been speaking.

Voir Dire Examination (T1077)

Exhibit 56 contains the names of all the customers of Panther to whom any of these products were shipped between the first of January, 1953 and the end of April, 1953. Every delivery is listed and there is no way to tell by that exhibit which

(Testimony of Ethlyn Grimmer.)

customers receive the primer. I do have such a record.

Defendant's Exhibit 56 admitted. (T1078)

Direct Examination—(Continued) (T1078)

On Exhibit 56, the first column contains the name [183] of the customer of Panther; the next column the customer's address; the next column the auto freight name; the next column is whether the shipment went out prepaid or collect; and the next column is Panther invoice number which I had received from Fort Worth.

Those are the names of every customer, his address, Panther's invoice number, and the carrier which transported the merchandise, shipped from the Riverside Warehouse of Battleship products from the first of January until the end of April of 1953.

Defendant's Exhibit 51 for identification is one of the 3 copies of the invoice we receive from the Panther Company which we send to the warehouse for filling. This is the copy which we retain for our files, and this is a part of our permanent files. Exhibit 51 contains a copy of every invoice that went out, together with the freight receipt from the carrier.

Voir Dire Examination (T1083)

The first invoice in Exhibit 51 is dated December 29, 1952 and the last one January 27, 1953, which represents all of January's business of any nature

(Testimony of Ethlyn Grimmer.)

with the Panther Oil Company. January is always a very light month.

Defendant's Exhibit 51 admitted. (T1084)

Direct Examination—(Continued) (T1085)

Defendant's Exhibits 52, 53 and 54 for identifications are the same records of the deliveries to the carrier and our copy of the invoice for Battleship products in the months of February, March and April of 1953.

Defendant's Exhibits 52, 53 and 54 admitted. (T1085)

The pink sheets comprising Exhibit 56 are made up from the invoices sent by Panther contained in Exhibits 51 through 54. These were all made up by me as I do all the Panther work myself. The invoices are filed numerically, but the pink sheets are listed in order of the date of delivery.

Cross Examination (T1087)

This material comes into the warehouse in drums of various sizes and all we do is store them. We simply remove them from the railroad cars, they are closed and sealed, they are stored, and are shipped to the customer on order.

The items of damage reported to the railroad are when drums are bent or stove in or leaking, in which event they are sent back to the railroad immediately.

Redirect Examination (T1089)

Nothing in the way of damaged merchandise is

(Testimony of Ethlyn Grimmer.)

put [185] in the warehouse; the physical property is returned to the railroad.

RALPH UHRMACHER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1090)

My name is Ralph Uhrmacher; I am Research Director for the Panther Oil & Grease Manufacturing Company of Fort Worth, and have been so employed for a few months better than four years.

I received a bachelors degree in chemical engineering from the University of Arkansas in 1929 with first honors. I graduated first in the class in chemistry, first in chemical engineering, senior honors, engineering honors, and half a dozen other assorted ones. Because of that, I was offered and accepted a research assistantship to the Massachusetts Institute of Technology, which made me a member of the staff at M.I.T., and I received a masters degree in 1931 from that institution. Along with my duties as a research assistant at M.I.T., I was also assistant to the head of the department in his own consulting practice. I also worked with Professor P. K. Froelich, who has been the President of the American Chemical Society and is presently Vice President of the American Can Company. I also worked with Professor W. K. Lewis, who was considered to be the father of [186] chemical engineering. In my graduate work there, I had special

(Testimony of Ralph Uhrmacher.)

courses in heat transmission, distillation, advanced mathematics, thermodynamics, physical chemistry, and a variety of other subjects. My own particular work at the time was concerned with production of products from petroleum fractions covering the entire gamut. We laid the ground work in this particular work at this laboratory with which I was associated that is now manifest along the Gulf Coast in the production of the so-called petroleum chemicals or petro-chemicals. Some of those are now covered by patents that originated back in those days.

Both granted and pending, I hold approximately 8 or 9 patents covering a variety of fields.

My first position after leaving M.I.T. was as chief chemist for the Frankfurt Distilleries in Louisville, Kentucky, whose principal products were whisky and gin, where I was so employed for four years. From there I went with the Wilson-Jones Company at a plant in Kansas City. They manufacture bookkeeping devices of all sorts and are the largest manufacturers of that sort of thing in the world. My original work was to rehabilitate a group of buildings covering almost a city block and suit them for various purposes; then to set up a manufacturing plant; finally, to operate the plant for awhile; and then after all of that had gotten on a normal operating basis, I was transferred to the [187] home office in Chicago as research director. From there I went to Charlotte, North Carolina as plant manager and chief chemist for a firm of manufacturing

(Testimony of Ralph Uhrmacher.)

chemists whose name was the Radiator Specialty Company. They used petroleum products in their various products. From there I went to Panther.

A satisfactory roofing primer requires a great many things to make it operate properly under the various circumstances that it may be subjected to before, during and after application. For one thing, it is desirable that it meet Federal specifications, because a considerable amount of primer is bought by the government and it is desirable to have a standard item that meets the specification, and, also, a great many purchasers insist on a product that does meet Federal specifications. Battleship primer meets Federal specifications.

(Objection to last statement of witness on ground Federal specifications would be the best test; overruled.) (T1095)

I am familiar with the American Society for Testing Materials, and we use their tests, although we don't necessarily use them exclusively. In a general way, I am familiar with their specifications for a cutback asphalt, rapid-curing type. Defendant's Exhibit 57 for identification are the A.S.T.M. requirements for rapid-cure type [188] asphalts, more or less for road work.

Voir Dire Examination (T1096)

Panther primer is not manufactured according to these specifications, but it falls in the general class. The cutback asphalt referred to in this specification is one of a number of types that is used in sur-

(Testimony of Ralph Uhrmacher.)

facing roads. According to the technical definition of our primer, it is a cutback asphalt. There is a similarity, it is not identical. For one thing, the type of asphalt used is generally different.

Defendant's Exhibit 57 admitted. (T1098)

Exhibit 57 refers to five grades of rapid-curing asphalts. The first two grades have no minimum requirements for flash point by this particular test, but Grades RC-2, 3, 4 and 5 all have a minimum flash point of 80 degrees Fahrenheit when determined by the Tag. open cup. There are no specifications in this exhibit for this type of asphalt in which the minimum specification of flash point is higher than 80 degrees.

The primary requirement of a roofing primer is that it is waterproof, since in a great many applications the primer itself is the only waterproofing layer. The next requirement is that the material should be absorbed into the paper, and at this point I should mention that so-called [189] roofing felts are actually types of paper. As those age, the original saturant in the paper becomes brittle and is lost. It is therefore desirable to replace that in order to maintain a roof in good condition. Frequently, the owners of a roof prefer to use a material like primer to restore the original degree of saturation and then cover that from the same material with a waterproof layer. Permeation is that particular feature of the primer that permits it to seep down into the fibers of the paper and do this waterproofing.

(Testimony of Ralph Uhrmacher.)

It is quite obvious that the material must spread easily, because it is used in the cold and the normal tool of application is a roofing brush, a device something like a scrub brush but the bristles are a bit longer.

Ductility refers to the coating that is left after the solvents have evaporated or the diluents. The material that is left must be flexible so that when the roof moves around, as it normally does a great deal, there will be no cracking and breaking of the film. It wants to be rather rubbery.

The primer should have a controlled degree of volatility, which deals with the rate at which a material leaves a surface. It is necessary to have some of it lost pretty rapidly, because if the rate of loss is too slow, on a warm day and a sloping roof, all of your primer would end up in the gutter. On the other hand, if the rate of evaporation is [190] too rapid, then the material would cure or become hard before it had a chance to penetrate into the fibers of the roof itself, and it is a question of balancing elements of the diluent component of the primer.

In determining the desirable flash point of this type of material, we use the system that is used by virtually all the manufacturers that I know of, and that is to abide by the I.C.C. regulations.

(Objection to any reference to I.C.C. regulations as forming any standard in the case; Court ruled expert might give reason for his conclusions.)
(T1103)

(Testimony of Ralph Uhrmacher.)

For materials of this type, the I.C.C. regulation requires that materials having a flash point, as determined by the Tag. open cup, shall be over 80 degrees Fahrenheit if it bears no warning label, or if the flash point is under 80 degrees, that it shall bear a red warning label containing certain prescribed wordings and be of a certain size.

(A continuing objection to the line of testimony was allowed by the Court.) (T1103)

There are other requirements for materials with flash points below 80 degrees, depending on the nature of the contents.

The 80 degree point is not only used by the I.C.C., but all sorts of carriers, such as Railway Express and the Post Office Department and the shipments by boat abroad. We [191] ship to a great many foreign countries and we operate similarly in Canada and they have similar regulations, and in every case the 80 degree point is the one at which the regulations require no warning labels.

The test procedure for the Tag. open cup method is outlined very exactly in the A.S.T.M. manuals. They put out a series of manuals covering various tests, and prior to making such tests it is always desirable to check each one of the requirements.

You have to use a specific type of apparatus. In this test, you have to carry out the determination in what is called a hood or a closet which has absolutely no wind movement in it. You can't maintain one of the little flames required in the test if there is any movement. The manner of heating, the rate

(Testimony of Ralph Uhrmacher.)

of heating, the size of the flame, and the amount of material in the cup are rigidly specified. The type of thermometer has to be of a particular nature, and you even have to count a particular number which takes almost precisely one second in order to encompass the time that is required when you move your flame across the surface of the material at a height approximately one inch above that surface.

Without going into each one of these little minutia, what you do is place an amount of material in a little glass cup and that is surrounded by a water bath, a [192] sort of double boiler setup, and the water bath is heated by a gas flame. Normally, you have to run a test or two on the material so that it will heat up at the proper rate, and the test requires that you allow it to cool down each time in order not to have errors creep in.

Finally, you put in a precise amount of material, the level of which is determined by a little piece of metal which projects below the height of the rim by one-eighth of an inch, and then with a precision-sized flame on the end of a little burner, you check for a flash at the one-eighth inch height above the surface as you raise the temperature. The 80 degree temperature when the flash is obtained is the temperature of the material. The temperature of the atmosphere has very little to do with determining flash points, unless ridiculous temperatures are involved.

Defendant's Exhibit 58 for identification is a sam-

(Testimony of Ralph Uhrmacher.)

ple of Battleship primer as we produce it at our various plants to send out for samples. It is taken from the same tanks as the production runs.

In the Tag. open cup test, it would be necessary to expose our primer to a temperature of 80 degrees long enough so that the primer itself achieved that temperature before it would flash. Then it would have to be in a draftless room at a height of no less than one-eighth of an inch above the surface of the material. [193]

When the flash point is reached, it is just the vapors that burn and not the material itself in the normal flash test. At times it does in certain tests, but the vapors flash first and then the fire goes from the vapors to the material in those cases. Ordinarily, that is what is called a fire test, which is a much higher temperature.

The vapors do not remain standing just over the top of this cup for an indefinite period, but they are constantly being lost.

Voir Dire Examination (T1110)

Exhibit 58 is not a sample of the primer from the shipment Mr. Segerstrom received, but a sample from normal production in the plant. I do not know when this sample was produced. The samples might be packaged at any one of a number of plants we have, all having been made to the same specifications.

Defendant's Exhibit 58 admitted. (T1112)

(Testimony of Ralph Uhrmacher.)

This sample is quite liquid and will run if tilted. It is about comparable to a thick paint.

(Defendant advised Court Defendant's Exhibit 59 for identification, pursuant to pre-trial procedure, was one of the samples taken of primer left after the fire.) (T1112)

Defendant's Exhibit 59 for identification is one [194] of the samples I received which I was informed had been taken from the primer left over after the fire.

Defendant's Exhibit 59 admitted. (T1114)

I am thoroughly familiar with Exhibit 59. To my knowledge, we never produced anything like that at any of our plants. I ran tests on this material.

Exhibit 25 contains our specifications for this primer. The contents of Exhibit 59 differed most markedly with our specifications in viscosity, which is the ease with which it would pour. Using standard test procedure, our requirements are that the minimum shall be 200 seconds and the maximum 240 seconds. Exhibit 59 had a viscosity of approximately 1100 seconds. I would say Exhibit 58 would comply with our specifications within the reasonable limits to be expected there.

It would be very difficult to spread the material contained in Exhibit 59 according to the instructions contained in the instruction book, but it is barely possible on a very hot summer day.

There are only certain types of oil fields that have the correct crudes to make the best type of roofing asphalt. You need the so-called asphalt crude. If it

(Testimony of Ralph Uhrmacher.)

is specifically suited to roofing purposes, we feel the best fields are those located in Oklahoma, Texas, Wyoming, Illinois, and I believe one Ohio field, and we have suppliers in each of [195] those fields. The material for the primer which we ship to the Northwest is produced in the Wyoming fields by the Standard Oil Company of Indiana at Casper, Wyoming, and that was the source of the material shipped to Mr. Segerstrom.

I have a familiarity with the process followed in the Casper refinery. I have been through a number of refineries and I have had the process explained to me, and I have been around oil plants off and on for a great many years, and am generally familiar with what is done in the refining process. In connection with my duties as research chemist for Panther, it is necessary for me to be familiar with the steps of production of this material. I have not been through the refinery at Casper, but I have seen similar ones and the basis of production is substantially the same in all refineries handling this type of crude.

In the general process of refining crude, to begin with there is generally a crude supply coming in, which I will show as a line (drawing on blackboard). That generally is under pressure. From this line there is a take-off by means of valves to that section of the refinery where the stills are located. A still is a device for putting heat under controlled conditions into a material and thereby allowing a portion of the material to be boiled off and leave

(Testimony of Ralph Uhrmacher.)

another portion behind. Ordinarily, in the refinery they use what are called continuous stills, so that this [196] particular action takes place on a continuous basis. Therefore the capacity of a refinery is not determined by how much any one still holds, but how much they are able to process each day. It is normal to put a so-called bank of towers, which is a refinery name for these stills, in one particular section where they will be well located, and we will set up a line of these over here (drawing).

The number of stills used is determined by the number of products one wants to take off, because according to the theory of distillation on a continuous basis, you may take off only one overhead product, material that boils over the top, and one bottom product. If you don't, you get a mixed-up material. I show five stills, but it can be six or more. We will assume that over here are heaters or furnaces, which are closely related to a steam boiler.

The crude then would come in by means of pumps to this furnace and from there to the still. These stills are very tall and the insides are divided into compartments so arranged as to have a large number of places where the material boils, evolves a vapor, and part of it is condensed and dropped back. Such an operation is called fractionization, and the idea is to try to get each particular material that comes off as nearly alike as possible. The material goes through one of these towers having an overhead and a bottom that comes back and goes to the next still, and this [197] process is repeated

(Testimony of Ralph Uhrmacher.)

until the final still has your residue coming off of its bottom.

On the first still, the lighter fractions come off first and boil over the top of the tower, which are then taken off and stored one place and the balance passes on through and the process is repeated. If the first portions contain too much of the material called casing head gas, which is now put in what is called L.P. gas, such as butane, propane and sometimes a little pentane, these are generally sent to a compressor plant where they compress these materials and put them in cylinders. This first product that comes off comes off in the form of a gas and has to be put under pressure to become a liquid, and that is the L.P. gas, which means liquified petroleum.

The next material which comes over is the raw materials from which gasoline is made. Again, after those are condensed, they are pumped to storage tanks situated a very considerable distance from these stills by reason of the fire hazard.

The next product generally is a type of material called a heavy blending naphtha, or it can be any of a number of so-called Stoddard solvents or whatever the particular refinery can sell.

The next material that would come off would probably be kerosene, and these are all overhead products, the [198] bottoms go on down the line.

Finally, the next section would probably take off a variety of burning oils and, depending on just how much sale they had for the different types, they

(Testimony of Ralph Uhrmacher.)

might divide them or fractionate them further in another set of towers. It is also possible to take some of these products, put them through a process called "cracking," and produce some more gasoline components.

The last still, in the case of a type of crude that has lubricating oil fractions, you would have lubricating oil mostly present at this end. In the case of an asphalt crude, you end up mostly with so-called residual or asphaltic material. In the form that it comes out of the bottom of the still, that is a type of road oil, but if you wish to make certain other types of products from that, then this material is treated further, frequently by putting a vacuum on the still so as to remove the necessity of very high temperatures. You can then remove volatile materials without exceeding a safe temperature. Then that material would go to a further processing setup. In the case of an air-blown asphalt, such as is used in roofing products, that is called either a blowing still or a blowing tower, and from there it goes on to another process.

In each instance, after the top has been taken off, the bottom has been passed down for further distillation. [199] When you get down to the bottom end in the last still, you have an asphalt, in the case of an asphalt crude. At that time, the asphalt is a viscous, thick, gooey and generally very smelly material.

The word "cutback" is used around a refinery to indicate the thinning out of a solid or semi-solid

(Testimony of Ralph Uhrmacher.)

material with normally a petroleum distillate to cut back its viscosity characteristic, to make it handle more freely.

Generally speaking, to obtain the primer we customarily sell, the first requirement of cutting back would be a tank, either a vertical or a horizontal one. The procedure is first to run in the calculated amount of diluent or solvent into this tank. Then at the bottom of the tank is a pump which takes the material off to any one of a variety of places as determined by valves. This procedure will vary from place to place, but, in general, this is the process used at all of the plants.

With the solvent in position, the next operation is to bring in the hot asphalt, generally around 350 to 400 degrees, depending on plant practice and outside temperature. In the case of products made of a blown asphalt such as ours, that is pumped from the blowing still. As the hot asphalt falls into the material, the pump picks up the material from the bottom of the tank, pours it over the top, and there is a certain swirling action so that you get mixing [200] both round and round and over the top. The idea is to mix thoroughly and completely. The general temperature at which the batch finishes up will be somewhere around 200, 250, perhaps a little higher. Normally, it will be at a minimum of 200 degrees.

At this particular stage, invariably, a sample is sent to the laboratory for testing. All petroleum products, and specifically asphalt products, are

(Testimony of Ralph Uhrmacher.)

made to specifications. Therefore, it is necessary to make sure that all batches are to specification. Sometime later, another sample is taken to see if there has been any change. If there has been no change, as soon as the conditions have become regular and uniform, then the entire set of analyses required against the standard specifications are run, and that determines whether or not the material may be shipped. In substance, other than the distillates, the specifications contained in Exhibit 25 are those that are taken at that time.

At this stage, you have completed making your material, then you have to get rid of it, which is one of the biggest problems around a refinery. You have to keep it moving; otherwise, it crowds up and tankage is at a premium around every refinery. So the next stage is either to send this to a storage tank or to ship it out. The material is always handled hot. It is normally shipped at a temperature of around 200 degrees. [201]

In this specific instance, the material is shipped from Casper to Denver.

In the case of shipments of primer to the Pacific Northwest, the material is received at Denver from the tank car or tank truck and pumped into a storage tank.

I was in Denver when we bought the place and I examined each item that was there. I had a great deal to do with the physical setup and am thoroughly familiar with the setup at Denver. The practices followed there are substantially the same as

(Testimony of Ralph Uhrmacher.)

are followed in other packaging plants around through our system.

After the material is received at Denver, it is pumped into the storage tanks, which are equipped with steam heating coils. The material normally loses about 10 degrees in transit. Asphalt loses heat very slowly and picks it up very slowly because of a number of characteristics, including its viscosity. When it is received in Denver, its temperature would be somewhere in the neighborhood of 180 to 190 degrees.

After being pumped into storage tanks, in the case of primer, the material as it is received is the primer, so for that purpose it is pumped from the storage tank through steam-heated lines to a packaging tank inside the building. The primer is the identical product shipped out of Casper and nothing more is added or taken away at Denver. In the [202] case of our asbestos roofing and cement, other materials are added to them to suit them to the specific end requirement. The basic product received from Casper is the asphalt component in most cases in the various other products.

The primer, being a very viscous material, the change in temperature is not aided by convection currents. When you are heating a material like water, which is thin, if you heat a part of the water, let's say, in the bottom of a container, that material becomes lighter and tends to rise, allowing colder material to take its place at the surface that is being heated. In the case of a viscous material

(Testimony of Ralph Uhrmacher.)

like asphalt, the sluggishness of it keeps it from moving. Consequently, one part of it can get very hot and a portion adjacent to it wouldn't show any change in temperature at all. Furthermore, materials like metals and also certain liquids like water transmit heat across themselves. This is termed heating by conduction. Asphalt does not have this property.

(Objection was made to reference to instruction in instruction booklet that material should be warmed by placing in warm room for 72 hours if too cold for application on ground booklet shows on its face it only applies to liquid asbestos roofing coat. Jury excused for noon recess, and there followed discussion between Court and counsel concerning instructions for application of Battleship products. The Court ruled neither side should have a witness [203] interpret the instruction booklet; that it should be left to the jury. (T1138-1144)

The noon recess was taken.

Tuesday, May 4, 1954, 2 o'clock p.m.

RALPH UHRMACHER

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued) (T1145)

Assuming that the primer in a 55-gallon drum had been chilled to a temperature of about 55 degrees, the best method to warm it would be to put

(Testimony of Ralph Uhrmacher.)

it outside in warm weather in the bright sun, because then you get the additional heating from the sun along with the air temperature to help it warm up. If that isn't available, it can be put into a warm room. With either method, about three days is a pretty good time to bring it up to the ambient temperature, normally.

The corporate name of the operating company of our Denver plant is the Motor Royal Company, but it is always referred to as Royal Oil Company. It is affiliated with the Panther Company and is under my general supervision, and I am thoroughly familiar with the workings there.

(Defendant advised the Court that Defendant's Exhibit 60 for identification was the report of the U.S. [204] Meteorologist on the climatic conditions during the months of March, April, May, June and July, 1953 in Spokane.) (T1147)

Defendant's Exhibit 60 admitted. (T1147)

Excerpts from Defendant's Exhibit No. 60

Local Climatological Data, Spokane, Washington (Geiger Field), shows the following temperatures: (July, 1953)

1953	Max.	Min.	Average
July 6th.....	89	53	71
July 7th.....	91	58	75
July 8th.....	87	62	75

I have examined Defendant's Exhibit 60, which gives the date, the maximum and minimum tem-

(Testimony of Ralph Uhrmacher.)

peratures, and the average temperature for the 24 hours of the data indicated. Then at the bottom of the tabulation there is the maximum average and minimum average for the month.

(The following temperatures were read to the jury by defendant: March, 1953: average maximum 49 degrees; average minimum 39.9; average for month 40.

April: average maximum 55.4; average minimum 35.8; average 45.6.

May: average maximum 64.3; minimum 40.5; average 52.4.

June: average maximum 67.7; average minimum 46.7; average for month 57.2.

July 1st, average temperature 61 degrees; 2nd, 67; 3rd, 67, 4th, 66; 5th, 66; 6th, 71; and 7th, 75.)
(T1148-1149)

Considering the testimony to the effect this primer was received the last part of March or the first of April; that during the winter the refrigeration room at the plant in question had been kept at 32 degrees; that the refrigeration [205] was shut off about the first of April; that this primer was placed in that room immediately upon receipt and kept there until the afternoon of the 7th of July at noon, when it was taken out and put in the sun on the south side of the building; that the room was made of pumice stone; that inside of that room there was 8 inches of insulation; that there was a ceiling 18 feet high, upon which there was 8 inches of balsam insulation and that over that a curved roof; and

(Testimony of Ralph Uhrmacher.)

bearing in mind the temperatures that have just been read which prevailed during this period; in my opinion, there would have been a very considerable lag in achieving the average temperature of the 7th of July in that room. It is a case of just an educated guess, but in my judgment it would lag approximately 10 days.

If left in that room for a period of more than three days, the primer would achieve the room temperature, whatever the room temperature would have been. If the room is warming up, the temperature of the primer would have some lag over and above the lag of the room in achieving the average temperature of the outside air.

Under those conditions, I should estimate the temperature of this primer would be within a few degrees of about 50 to 55 degrees prior to the time it was taken outside of the building on July 7th. At that temperature, it would have been thick and difficult to spread and handle. [207]

To have been applied readily, it would take more time than the procedure of taking it out about noon, exposing it to a temperature of around 90 degrees, leaving it there overnight and attempting to apply it the following morning. It would have had only time enough to pick up a little temperature, then it would tend to cool off again at night, so that the over-all effect would be minimized. Also, in the case of a material of that sort, the colder material tends to go to the bottom of a container. The

(Testimony of Ralph Uhrmacher.)

warmer material would be at the top and the colder material at the bottom.

When you arrange a drum to withdraw material for application, you try to give yourself the maximum amount of head, that is, the most level above the opening that you are trying to withdraw from. As a consequence, the coldest material will be around that opening that you are trying to draw from, whether it is drawn from the side or end of the drum. If the material were only partially heated, the warm material would be above the point you are trying to withdraw from.

As part of my duties, I arrange for the type of enamel placed upon these drums. It is a special type and is made under my supervision. The labels placed on the drums are also enameled. If the label on the drum were on the side away, with a radiating source of heat, and the rest of the [208] drum were exposed to it, the drum could attain a temperature of somewhere between 350 and 400 degrees without showing any visible effects of scorching or burning.

Defendant's Exhibit 61 for identification is an analysis I made of material sent from your office labeled "Segerstrom Primer, Sample B-1."

(Stipulated by counsel that Exhibit 61 was one of samples taken from bottom of drum on Rosenbaum place.) (T1157)

Or April 6, 1954, I ran a Tagliabue open cup flash test on this sample, viscosity at 122, distilla-

(Testimony of Ralph Uhrmacher.)

tion on the primer, and then a distillation on the solvent recovered from the primer.

The viscosity was 1196 seconds, according to my figure, as compared with a maximum of 240 permitted by our specifications, being many times higher.

I obtained a flash point of 94 degrees, which is what it generally runs in our primer, sometimes a little higher.

In the standard distillation on the primer itself, the first drop came over at 260 degrees Fahrenheit. The distillation receptacle holds about a pint of material and looks something like this (drawing). In that there is a thermometer inserted to a specified depth. Then you have a device called a condenser. This device is all glass and it is all [209] sealed. Cold water enters at one point and leaves at another, thereby condensing any hot vapors that come over. In this test, according to the standards of the A.S.T.M., the temperature at which the first drop comes off the end of this condenser is recorded as the first drop temperature. The data shown on Exhibit 61 shows the temperatures at which the various quantities came over into the receptacle. You read the quantity in the receptacle and then read the temperature.

Voir Dire Examination

(T1161)

Exhibit 61 was written up shortly after I made the original tests from some other notes. It was not

(Testimony of Ralph Uhrmacher.)

written since I arrived in Spokane. It was written up on April 6th, the date the tests were made. I threw the other notes away as soon as I made this copy. I didn't make up anything more formal than this, nor did I send anything to Mr. Graves. I think I brought it in my pocket or in one of my suits.

Defendant's Exhibit 61 admitted. (T1162)

The characteristics of the primer disclosed on Exhibit 61 would be a reasonable approximation of our primer at the time it is packaged and ready to be shipped to the customer, except that the viscosity is completely different and outside of the fact it is a little shy in total solvent.

Referring to Plaintiff's Exhibit 27 and to the red [210] line marked "Gasoline from roofing primer," with an initial boiling point of 120 degrees, a break in the middle, with an upturn and an end point of 330 degrees, the distillate portrayed on that exhibit is typical of the distillates used in our primer at the far right-hand end, but the left-hand end is a stranger. I mean by that, we require by our specifications that the initial boiling point be 190 minimum, so that if you would start at a point over there that reads 190 degrees, that is the lowest that the material could start to distill at.

You would have to add a very light material to our primer to obtain a distillation curve such as appears on Exhibit 27. If you look at the other curves on that exhibit, you will see they are all

(Testimony of Ralph Uhrmacher.)

smooth, there are no discontinuities in them and no plateaus. In distillation, as you get to the point where most of the more volatile materials have been removed, you reach a place where there is relatively little of the more volatile material and substantially all of the less volatile material in position. In that case, you get a rather rapid rise in temperature with a small amount of material being distilled over, the curve something on the order of this (indicating on exhibit), and then you start to get the effects of the less volatile material as a single component coming over where there is relatively constant temperature. Accordingly, whenever you get a curve that [211] doesn't go smooth like these do, you have no reason to doubt but that some strange material has been put in that has this characteristic on top of some other that has this one on it (indicating), let us say, and the material put in will bend this one down so as to form the slope there corresponding with the temperature change with the small amount of material that has been removed.

As a practical matter, the primer that we package for delivery to our customers could contain a distillate substantially lower than one with a boiling point of 190 degrees in quantities no greater than a drop to a full 55-gallon drum. It would be the merest trace, if you could determine it at all.

The reason for that is, in the first place, you start off with a material which has been put through a refining process so as to have stable characteris-

(Testimony of Ralph Uhrmacher.)

ties. The fractionating towers that are used at the refineries remove the light ends. They have a great deal more value to the refinery than for use in a cutback; consequently, they save them. Then, because the material is handled with agitation and at relatively high temperatures so frequently, any really [212] light ends such as the material shown on Exhibit 27 would be lost. Finally, the method of test is such that, unless there were very substantial amounts of the material in the cutback, the test procedure would tend to lose slight traces.

The starting temperature of the cutback mixing tank is generally whatever happens to be out in the yard. In warm weather, it will be one thing; in cold weather, something else. Generally, it will end up at somewhat over 200 degrees. That would boil out a material with a boiling point substantially less than 200 degrees to a considerable extent. It would remove probably the greater part of the material on the very lower end of the curve shown on Exhibit 27, certainly.

In determining whether a product should be labeled dangerous in the course of business, you always consider the flash point of the final product; you are not worried about the individual components.

I have distilled a distillate with a very low flash point off our normal beer. If you were to take a regular can of beer and put it in a special type of distilling apparatus called a fractionating column, you would remove a certain amount of a material

(Testimony of Ralph Uhrmacher.)

called acidaldehyde. This material boils at about 21 degrees, I believe, and flashes at about 58 degrees below zero.

We produce two materials that have flash points [213] below 80 degrees Fahrenheit. They are aluminum paints, one with an asphalt base, one with a synthetic resin base. Both of those are always labeled with a red warning label, as prescribed by the Interstate Commerce Commission.

For all the manufacturers that I am familiar with and the products that they produce, if the material is flashed below 80 degrees, they put a red warning label on it. If it happens to be a corrosive chemical so there is danger other than from fire, they put similar warning labels of appropriate nature on it. If, however, the flash point is above 80 degrees and there is no corrosive, there are no warning labels.

I recommend the type of containers for the shipment of our product, but I do not do the purchasing myself. I do make tests on them. I have handled literally hundreds of thousands of buckets such as Plaintiff's Exhibit 22. The bottom of the bucket is produced as a stamping from sheet metal, as are the sides, but the bottom is attached to the sides by a crimping method and with the aid of a sealing compound in a sort of a well, so that when the metal is turned to form a lock, the side of the bucket is sealed on both sides with a sealing compound. The sealing compound varies with the contents of the container and you must specify what you are going

(Testimony of Ralph Uhrmacher.)

to package in a bucket before the bucket manufacturer will produce buckets for you, because one sealing [214] compound and one type of inside finish will be suited for one material and be totally unsuited for something else. The sealing compounds are normally melted to be poured into the bottoms before they are assembled, and they will flow out again if you raise the temperature above that melting point. We will call this the side of the bucket (drawing); then the bottom of the bucket will have a shape something like this. The sealing compound is put into this little well right here, and then in fabrication this is slipped up in this fashion and then the whole piece is turned up so that you get a lock over here. The sealing compound actually seals the bucket and keeps thin material from coming out, and when that is melted out, then you have a tendency of having seepage coming through the pieces of metal. You can't make a perfectly tight seal from just the metal alone.

Assuming at the time of the fire the buckets which were being used on top of the stove were buckets that had been picked up off a dump and had either been used to carry paints or insecticides, and that those buckets for periods of approximately 10 minutes at a time were placed on the fire in a barrel stove with temperatures fluctuating from 300 degrees up to 900 degrees time and again over a period of a couple of hours, that would have a tendency to remove the sealing compound which I have referred to.

(Testimony of Ralph Uhrmacher.)

Assuming that during the same period, over the [215] same type of fire, approximately 55 gallons of this primer had been heated to the point it would have been heated if the buckets had been permitted to remain on the fire for 10 minutes each time, there would be a considerable tendency for the primer to have evaporated or volatilized. That same tendency would exist with reference to all other petroleum products that I know of; they all would tend to vaporize.

Assuming there was some seepage from the bottom of the bucket and droplets would fall into the coals, there would be a little flareup of fire at each point the droplets from the bucket would reach into the coals or some place where there was a flame. If the flareup were high enough to touch any portion of the vaporization which had reached a combustible stage, you would have a flash fire.

In pouring these buckets, you would normally expect a certain amount of the material to drip down the side. The material would tend to lose some vapor by the heating and there would also be a tendency to melt the residual asphalt material and have it run down the bucket. Then when the drop hit the coals, why it would flare up and have a little tongue of flame run up, just like a drop of fat.

There would be no relation between the temperature of the primer in the top of the bucket and bottom of the bucket under these conditions. In heating a material such as primer in the cold state

(Testimony of Ralph Uhrmacher.)

over a bed of coals, there would [216] be a tendency to heat only the bottom of the bucket and you would tend to have a hot core with an outside shell and a top that would be quite cold.

It would be impossible to heat any form of petroleum product over a fire that is flaming from time to time in a closed room without ultimately having a body of vapor form which will be combustible, irrespective of how high the flash point may be. As soon as you reach the explosive limits and if there is a source of ignition, something goes. If you follow this procedure long enough, inevitably you have a fire.

Cross Examination

(T1177)

In view of my last answer as affecting the need for a warning label on the material, you couldn't figure that anybody in his right mind would try to heat it over an open fire inside of a room. Outdoors it probably wouldn't be dangerous. It would be dangerous to heat the roof coating, any petroleum product, even axle grease, in the same way.

The roof coating is considerably heavier than the primer and more difficult to spread. Flash point determinations on material like that are rather difficult to get, but it would be somewhat higher than the primer.

It is possible someone might try to heat this material, but if they did, they would almost always do it outside. I have never heard in 25 years of anybody doing it [217] inside.

(Testimony of Ralph Uhrmacher.)

(Objection to the question: "But you recognize that somebody might try to heat this stuff?" as argumentative; overruled.) (T1179)

People will try to do all sorts of foolish things. I recognize the layman might try to heat the material, which is the reason the booklet says "Do Not Heat." That instruction is given, not because it would be dangerous, but if you heat roof coating, which is a very much more difficult material to heat than primer, you could ruin its waterproofing qualities. You can blow up a building if you boiled anything, including lubricating oil. Even water explodes, and terribly. Consider boiler explosions. It is not a flammable vapor.

From the testimony of Mr. Woods, I would say more than likely what happened was there was a gas vapor explosion caused by the fumes coming off of the material while it was being cooked inside of a building.

We didn't put anything such as "Do not heat inside a building" on the barrel; in our books, we say don't heat at all; that if you have to warm it, put it in a warm place. There is no warning label on the barrel, there is no need for them.

We comply with the I.C.C. regulations in the interest of safety, not because we are afraid of anything, but [218] we try to make everything safe, our plants and our products.

The purpose of a flash point test is to determine what temperature, under certain test conditions, will give a flash. This, in turn, is a measure of the

(Testimony of Ralph Uhrmacher.)

hazard of a material, but it does not indicate that the degree of hazard takes place promptly at the flash point.

It is the temperature of a particular material at or above which it is giving off inflammable vapors in sufficient quantities to form an explosive mixture under the conditions of the test, and no others. It would be a considerably higher range before normal conditions would take into consideration the test conditions.

In the petroleum industry, all materials that may be flammable under any conditions are handled with extreme caution, whether they are above, below, or at their flash point.

Flash point is the dividing line between hazardous and non-hazardous. A material having a flash point of 80 degrees could have a match held over it an inch above and not flash; if you dropped the match in it, it would flash. It wouldn't be hazardous unless an open flame came within one-eighth of an inch of the surface in a room without drafts. A little ways above 80 degrees, your flame would move up a few fractions of an inch. Above 80 degrees, the vapors might be going off and collecting and be subject to [219] explosion under unusual conditions.

I believe the I.C.C. requires containers for shipment of flammable materials to be of certain specifications, to be sealed in certain ways. Those with flash points at or below 80 degrees are to be labeled. Our specifications call for a minimum flash point of 80 degrees; we stay above that.

(Testimony of Ralph Uhrmacher.)

If there were a can of gasoline in a closed container sitting on a bench in this room, there would be no hazard as to that, providing it was perfectly closed. If there were an open can of gasoline, there could be a hazard if some flame or spark were introduced somewhere around where the gas vapors were if they were in the explosive limits. As to gasoline and substances in that class, the explosive range is roughly from 2 to 6 per cent of the vapor mixed with air.

I.C.C. regulations deal with shipments in closed containers, but containers get broken in shipment. The reason a manufacturer places warning labels on containers of flammable material so far as the ultimate user is concerned, he considers the way the material is going to be used and whether the ultimate user may get into a condition that might be dangerous. He knows the ultimate user sometimes doesn't have very much knowledge about these things, so that he should be warned under the conditions that the material is going to be used.

The primer in Exhibit 58 is our normal production; that in Exhibit 59 is what I received for testing; and there certainly is a vast difference. Exhibit 59 is a little deficient in solvent, we would never have passed it. It is not sufficient to account for the difference in itself. I believe the asphalt base is the same, though I did not make extensive tests on the asphalt.

I don't think it is possible that the material reached Mr. Segerstrom in that condition. Some-

(Testimony of Ralph Uhrmacher.)

thing must have changed it. I have never seen a primer that looked like that. I am not indicating that somebody put gasoline in this material; I just said what was present. The lower part of the curve on Exhibit 27 was not ours. I never tested the material that was sent to Mr. Segerstrom. I personally only make tests of this material about once every three months. My department controls the testing for the Panther Company. On most of it we only run a flash test and viscosity test, but Royal Oil Company have their own testing procedure. Of my personal knowledge, I don't know what the Standard Oil Company does at Casper, but I have personal knowledge of what Royal does. I don't think I was at Motor Royal in 1953, so I have no personal knowledge by being there personally.

The Panther Company in Fort Worth receives samples about every three months from the subsidiary companies, [221] and we run viscosity and flash tests, which is about all we feel is required.

These things normally aren't considered as having boiling points or boiling ranges. Our specifications call for a minimum initial boiling point of 190 degrees Fahrenheit on the solvent; Exhibit 27 shows an initial boiling point of 122 degrees.

I wasn't there, I don't know that this material wasn't fabricated by the Standard Oil Company at Casper with solvent having an initial boiling point of 122 degrees. I could only say that I have never seen any that had that. If we have a solvent that is highly volatile, there is a characteristic odor in-

(Testimony of Ralph Uhrmacher.)

volved. We handle so much of this material that we can tell a great deal from its physical appearances and the way it smells. If it had a highly volatile solvent, we would detect it almost immediately. We make no test to determine the initial boiling point.

Our specifications call for about 40 per cent solvent and a minimum flash point of 80 degrees. I don't think it is a correct statement to say that Standard Oil Company had to use what amounts to a gasoline as a solvent in order to bring the flash point of the entire mass of this material down to 80 degrees. If they particularly wanted to bring the flash point down to 80 degrees, they could use various naphtha cuts, although why they should want to, I [222] don't know. We permit them to bring it down to 80 as a minimum. If they accepted the invitation to bring it down to 80 degrees, they could use gasoline, but they wouldn't because gasoline is worth more money than naphtha. At every refinery gasoline is the most valuable product. Gasoline does not cost less at the refinery than a Stoddard solvent.

If the refiner wanted to do it for some reason, he could be conforming to our specifications in cutting this asphalt back with gasoline. We would find it out immediately that we checked it. With reference to my tests, I test sample productions every three months.

A primer with a flash point of 120 degrees would be unsatisfactory, because it would cure so slowly

(Testimony of Ralph Uhrmacher.)

you would have trouble with it running off of sloped roofs.

We don't have any solvent with the nature of gasoline in it. I think Mr. Kniseley probably got correct results with the material that he had. Possibly there are some gasolines with initial boiling points of 190 degrees.

A road asphalt has different properties than the asphalt portion. The solvent portion may be similar, as well as the viscosity and flash point. Those are the only tests we run every three months on the samples from the subsidiary companies. We would know it if the manufacturer were selling us an ordinary road asphalt from our tests. A road asphalt is one of the cheaper products of a refinery.

The Motor Royal Company package this material and also test it as it is received and check to make sure it is the right material and the right grade in the chemical laboratory right on the premises. I didn't tell about the tests made by Motor Royal on my deposition because you didn't ask me. You asked me, personally, what I tested on it and I told you. Motor Royal receives this material in tank cars from Standard Oil Company at Casper, Wyoming; they put it in these drums, label it and ship it out.

The drum that Mr. Segerstrom received could have had the material that Mr. Kniseley found in it without my knowing it, but Motor Royal probably would. They have always done their job in the

(Testimony of Ralph Uhrmacher.)

past and they have a very capable man doing the testing.

The sample on which I made tests was taken from the bottom of the barrel. It is not true that if there was any separation at all in that barrel, the heavier asphaltic types would go to the bottom and the volatile parts would come to the top.

On my deposition taken April 26, 1954, I did state that I did not have the results of my tests with me in Spokane. At the time I had forgotten when you said Spokane that my bags were at the hotel and I had the tests there.

It would be a very unusual situation where you would have to heat the roof coating to the same extent as the [224] primer, but the same normal procedure would apply. It should be placed in a warm room and should never be heated over an open fire, and it would be a reasonable precaution not to have any fire around it. A fire could be somewhere in the immediate vicinity of the roof coating, but not underneath the barrel or right close to it, as that could be dangerous under unusual conditions and it is just being safe.

Plaintiff's Exhibit 62 for identification is a sales manual put out by the Panther Company and distributed to their salesman. I presume it tells them how to sell this product, I haven't read it. I have seen it.

Plaintiff's Exhibit 62 admitted. (T1214)

(Plaintiff then read the following from Page 93 of Exhibit 62: "Be sure that the temperature of

(Testimony of Ralph Uhrmacher.)

Battleship is raised to a normal temperature of around 55 to 60 degrees. It can be done in one of the following ways. (a) Place the Drum of Battleship in a large galvanized iron wash tub, fill the tub with water—then build a fire outside the tub. The flames should not come in contact with the drum itself, because too high a temperature causes the waterproofing oils in the roof coating to congeal, thereby destroying its waterproofing qualities. Builders Naphtha may be used to thin Battleship if none of the above methods prove entirely satisfactory. However, Kerosene, Gasoline, or other solvents must not be used under any circumstances.”)
[225] (T1214-1215)

I am an assistant vice-president of the Panther Company.

A small portion of the solvent has to evaporate more rapidly than the rest. Since water boils at 212 and our initial boiling point is 190, then if you want to call water volatile, you could say there must be something of a highly volatile nature to evaporate rapidly. A portion of the solvent must volatilize with reasonable rapidity, about like water would, not like gasoline. Water is comparable as to volatility, but not as to flammability. There must be something in there that is more volatile than a safety solvent, such as one of the higher-boiling naphthas. If a petroleum product has a very low boiling point and is high volatile, it is hazardous. This would not be considered a highly volatile ma-

(Testimony of Ralph Uhrmacher.)

terial. I definitely would say that the solvent shouldn't evaporate slowly.

On my deposition, I probably said you want the solvent to evaporate slowly, but it was comparing the terrific volatile flash of gasoline and I was giving you a comparison at the time with gasoline.

I went down to the University of Idaho's laboratory last week and ran some tests on another sample to see how the tests compared with the ones I had run back in Fort Worth. I ran flash tests at that time and they ran about [226] the same, either 93 or 94, the lowest one being 93. I did not keep a record of these tests.

In my opinion, the primer couldn't have been in the form of Exhibit 59 when Mr. Segerstrom's men were applying the material. Something has occurred to change this material since it left the plant. On my deposition, I stated it was possible the material had that viscosity when it was opened for use.

It is true that occasionally these asphaltic materials will jell or thicken in the drums after a period of time. It can occur on very rare occasions. The amount is generally very slight. In my experience, it has only increased in viscosity approximately 50 seconds, I believe, over our high maximum. A purchaser may find it thicker in the barrel than when we put it in to a slight extent. In my experience, the material has never gotten to a condition where you couldn't put it on as it came from the barrel. If it is necessary to apply it in cold

(Testimony of Ralph Uhrmacher.)

weather and the person doesn't want to wait until it warms up, very frequently people that know what they are doing will use certain thinners. We don't put warning labels on the barrels for the reason we have never run into cases where they showed any need of having them. The material has been used by all sorts of people. We haven't had anything remotely resembling this incident happen. [227]

Redirect Examination

(T1225)

(Objection was made to a question as to the testing procedures followed at the Motor Royal Company on the ground the witness did not know of the same. Court ruled he might testify as to the program he set up.)

Voir Dire Examination

(T1226)

I am not an officer of the Motor Royal Company, nor am I employed or receive any salary from that company. I was there last about a month ago. Prior to July 8, 1953, I think I was there around April of 1952. Since I am in charge of the laboratory for the Panther Company, I regulate the manner in which the production concerning products handled by subsidiary companies is carried on. This primer is produced by the Motor Royal Company to our specifications. I am not familiar with whether it is done on a contractual basis.

(Objection renewed.) (T1227)

(Testimony of Ralph Uhrmacher.)

Redirect Examination—(Continued) (T1228)

I fix the procedure and test methods on all the products that are handled by Motor Royal Oil Company.

(In a conference before the bench between Court and counsel, the Court ruled the witness had not shown sufficient knowledge of what was done by other company.) (T1229-1230) [228]

With reference to the instructions which were read from Exhibit 62, that is a safe practice for hastily warming any of these materials. The water can reach a temperature no higher than 212 and the container is closed and the flames are away from the container, which has no relation at all to the procedure adopted by Mr. Rosenbaum in this case.

Recross Examination

(T1231)

The instructions refer to the drum of Battleship and it would be assumed that the drum was closed. People would normally keep the drum closed in that condition, anyway, to keep the water from getting in. It doesn't say anything about its being explosive or being liable to explode or anything of that sort. If the material were heated up to 212 degrees with the drum open, I shouldn't think it would be an explosive situation. It wouldn't be giving off a lot of vapor under these conditions. In the first place, it heats through slowly and the amount of opening involved is small.

(Testimony of Ralph Uhrmacher.)

The following questions were asked and answers given on my deposition:

“Question: Well, other than designating the quantities to be produced and the manner of packaging and the manner of shipping at your order, and so on, and telling that company it is to produce it according to these specifications, do [229] you have any other control over the actual fabrication of the material?

“Answer: Well, we periodically receive samples of this manufacture to check them against our specifications.

“Question: Yes, but otherwise any other control?

“Answer: No direct control from my particular point of view.

“Question: In other words, your company doesn't have a man constantly at the Motor Royal plant or the plant of any of their subcontractors to determine just what is being done in the actual fabrication?

“Answer: Not on a continual basis.

“Question: Do you largely confine yourself to checking after it is manufactured?

“Answer: That is customary in virtually all manufactured products.

“Question: And that is what you do?

“Answer: Yes.

“Question: And how do you conduct those tests of the primer that they are fabricating for you? Do they ship a barrel from time to time, or——

(Testimony of Ralph Uhrmacher.)

“Answer: No, they normally ship us a sample from a production run.

“Question: From a production run?

“Answer: Yes. [230]

“Question: From each production run?

“Answer: No, not necessarily from each one, on a sampling basis, using a statistical method of arriving at the proper amount.

“Question: So you don’t get a sample from each production run?

“Answer: We do not, no.

“Question: How often do you get a sample?

“Answer: Oh, I would say about once every three or four months, possibly.

“Question: And that would be the situation that prevailed in 1953?

“Answer: I should think so.

“Question: I suppose once, then, in three or four months they may have run several production runs of this material?

“Answer: I would imagine so.

“Question: Yes. And I take it, then, that the Panther Company or any of its immediate employees do not see the material at all except from the samples that are periodically received?

“Answer: I would think so.

“Question: In other words, the Motor Royal Company fabricates it, puts it in the barrels, affixes your forms, and ships it to your— [231]

“Answer: That is right.”

HOMER M. SCHAUER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination**(T1237)**

My name is Homer M. Schauer; I live at Casper, Wyoming. I am 32 years old, married, and have one child. I have been in Casper since April, 1952.

I am a chemical engineer employed by the Standard Oil Company of Indiana, and was so employed through 1952. I received a degree of bachelor of science from Iowa State College. Upon graduation, I was employed by the Presto-Lite Company in Indianapolis, Indiana for about six months in the manufacture of acetylene in the laboratory. I graduated from college in 1943. From the Presto-lite Company I went in the Navy and was discharged in 1946, at which time I went to work for Standard Oil at their refinery at Whiting, Indiana in the technical service laboratory in work connected with light oil processes, finishing and waste disposal. A certain nature of it was research work. From this employment I was transferred to Casper where I am a supervisor in the chemical laboratory.

There are between 45 and 50 men employed in the Casper laboratory and about 700 to 750 men employed in [232] the plant, which covers an area about a mile long and a half a mile wide situated on the North Platte River and part of which is inside the city limits.

Crude oil comes to the refinery from storage

(Testimony of Homer M. Schauer.)

tanks outside the refinery which is then put into the distillation process. Our crude comes from the Wyoming fields. We have two types we run there; one is a black or asphaltic crude from which we make our asphalts; the other is a green crude, from which we make our lubricating oils. These types are kept in separate storage tanks and we use different units for running the different type crudes and different products are obtained.

The crude is brought from the storage tanks into the still. A still is 10 foot in diameter by 40 foot long and it is horizontal. There are 5 stills in a series where we heat the crude up for distillation. We have two series in the plant that are used for processing crude. The stills are heated by a gas fire. The crude moves from one still to another as we are processing it.

From the first still we get a light naphtha, which includes our liquid petroleum gases. They come off together and when you cool it down, the light naphtha condenses, but the gases will go overhead to a compression plant. We don't sell bottle gas in our refinery, we send it to the fuel system. We pump the light naphthas to an [233] area which we call "Light Oils Finishing and Blending," where they are treated and blended into gasoline.

Gasoline which is sold for use as motor fuel does not come directly from the stills, but is made by another process after the distillation.

The material then moves to another still by

(Testimony of Homer M. Schauer.)

means of gravity. There is a difference of about 100 degrees in temperature between the first two stills, the first still being between 150 and 200 and the second one 250 to 300. Here the heavy naphtha comes off, part of which is used for cutback asphalts and part of which is used in other special products.

From the next still we get off kerosene, which we finish further and sell as kerosene.

From the last still, we take off a fraction which we call gas oil, which can be compared to a lubricating oil, and we process it further in a cracking operation to make gasoline and other products.

When the fractions come off, they are a vapor. Inside a closed system, you have a tower coming over the top of the still, which is a pipe, and this pipe goes through a big box with water in it and there it is cooled down and the vapors condense and flow down to a tank.

At this point, we have gotten everything off at the fifth still. We then heat the reduced crude up through [234] a furnace and pump it into a vacuum pipe still, which is under vacuum, and then more gas oils come off and we get off the bottom products, which are asphalts.

Each still has a furnace underneath them for heating, a gas-burning furnace, and the stills themselves are closed stills. In every case, these products come off in the form of vapor which is later condensed. The stills are on concrete foundations and each succeeding still is a little bit lower than the

(Testimony of Homer M. Schauer.)

preceding one, permitting a gravity flow from one still to the next.

When we have gotten down to the asphalts, we make various types of asphalt bases. The operation of this vacuum pipe still gives us different properties. Our lighter asphalts we take and subject to a blowing operation which will make roofing asphalts out of them. We use another still for this process in our refinery which we fill with this asphalt material and then blow air through it at temperatures ranging from 490 to 500 degrees. We have an air system which has 100 pounds pressure and a valve between the air system and the still, and the air goes into the still through a pipe with holes in it where the air comes out and goes up through the material. The pipe curves back and forth several times so that it goes through the entire mass of asphalt. This process changes the properties of the asphalt. It becomes harder, tends to become more viscous, actually will [235] become a solid at normal temperatures. It is blown at elevated temperatures in its liquid form. We maintain the still at a temperature from 300 to 350 degrees Fahrenheit and ship the asphalt directly from the still.

We have various customers for whom we make various asphalt preparations to their specifications.

A cutback asphalt is where you take a solid asphalt, which may be a straight vacuum-reduced product or one of these blown asphalts, and cut it back with a diluent. We have two diluents we use,

(Testimony of Homer M. Schauer.)

one is a naphtha and the other is a kerosene. The cutback made with kerosene includes medium-curing asphalts which are used for road surfacing.

The gases from the first still are sent to the compression chamber and the light naphthas go to the light oils finishing and blending area, which is located probably 2 or 300 yards away from the still, by means of suction pumps. The kerosene also goes to the light oils finishing area. The heavy naphtha goes to the cutback plant. Next we have the gas oil which is pumped over to where we have our cracking units located about 300 yards from the still. Finally, there are the two categories of asphalt, one that is blown and one that isn't. Our blown asphalts are more desirable for roofing purposes. I would say the solid asphalts are used for hot roofing, while cutback asphalts are used in cold roofings. [236]

The blowing tank for roof asphalts is in the same line with the crude stills about 100 feet away. It is just an old crude battery which we have converted to blowing stills. It is an enclosed still with a vent on it. The temperature at which the material is pumped into the blowing still will vary. We will put it in about 200, 300 degrees, as long as you can pump it. We use steam pumps for this purpose.

In making the cutback asphalt, we have what we call a cutback mixing plant, consisting of a number of vertical drums about three and a half by 30 feet high. First you put in the amount of solvent or diluent to make up the batch, and then you start

(Testimony of Homer M. Schauer.)

circulating naphtha from the bottom to halfway up or clear to the top, however you want to do it. At the same time, you start pumping in the asphalt which is generally at a temperature around 300 to 350 degrees. We pump the asphalt into the same line as where the naphtha is being circulated and your still will gradually fill up to the level which you have pre-determined. After being filled to this level, it is circulated for about an hour or more. Usually at that time, it is about two hours since you started the operation. We are circulating from the bottom of the still, where we can go near the bottom, the middle or the top.

At the end of two hours, we take a sample and send it to the laboratory to see if it meets our viscosity [237] specification. If it is not in the specification range, we have to either add a little more naphtha or a little more of the asphalt. Once we get into the viscosity range after circulating, then we make a complete test on the tank, which includes all the tests specified by the customer. In the case of the Panther Company, we run a flash test, distillation test, viscosity test, and certain tests on the residue from the distillation which have to do with penetration and softening point. It generally takes a whole day to run those tests. We quit circulating after we get it on the viscosity specification, but the material is left in the tank until the tests are completed.

If the material does not meet the viscosity range, we can again add more naphtha or asphalt to bring

(Testimony of Homer M. Schauer.)

it back into specification. If it is penetration or the residue is way off, then we will have to slop the batch. We send it to a tank which we call a slop tank, and from there we can send it to a coking operation, if it is heavy asphalt. It is all recovered as some type of product. Other than the viscosity specification which we can remedy, if a batch does not meet specifications, it never again goes back into the cutback asphalt plant.

At the refinery, we consider gasoline a finished product which is sold as a motor fuel. We take these naphthas from the crude running unit and treat them and blend [238] into gasoline, along with naphthas from cracking operations which have been treated and air blended into the gasolines.

The area where gasoline is compounded is 200 yards away at the closest point from the cutback asphalt stills. It would be physically impossible for gasoline to ever get into the cutback asphalt at our plant, because there are no lines going over that way. The various products are transported from one place to another in the refinery through pipe lines controlled by valves, most of which pipe lines are underground. It would likewise be impossible for any of the components of gasoline to reach the cutback asphalt stills.

At the conclusion of the mixing of the cutback asphalt, any foreign substance therein would be disclosed by the tests and the entire batch would be slopped. Another sample is taken when delivery is made to a tank car or truck. The sample is taken

(Testimony of Homer M. Schauer.)

when the vehicle is about two-thirds loaded and a viscosity test is run and a check made to determine if there is water present.

I have drawn a diagram on the blackboard indicating the physical arrangement of our refinery and the relative locations of the several processing units. The plant itself is one mile long and about a half a mile wide.

At our refinery, gasoline is the most valuable product we have. Thus, we make an effort to make everything we can into gasoline. Naphtha is one of its cheaper [239] components and only a certain portion of it can be used due to its low octane. In oil chemistry, "naphtha" is a term for a general class of products which originally come off the crude still. They generally boil in the range from 100 to 400 degrees Fahrenheit.

(Court adjourned until 10 o'clock a. m.,
Wednesday, May 5, 1954.)

Wednesday Morning, May 5, 1954, 10 o'clock a.m.

HOMER M. SCHAUER

having previously been sworn, testified further as follows:

Direct Examination—(Continued) (T1276)

There are six mixing tanks of a capacity of about 14,000 gallons each in which the cutback asphalt is mixed. The storage tanks have a capacity of about 36,000 gallons. Each tank and drum is numbered

(Testimony of Homer M. Schauer.)

and when samples are taken for testing purposes, each sample refers to the drum by number and a permanent record is kept of the analyses by drum numbers. When the sample is taken during the loading operation, it again refers to the tank from which it was taken.

The complete analysis is sent to the plant at Denver [240] by mail after each shipment is made. The driver of each tank truck also has a shipping ticket showing the viscosity and the amount. Our company has the originals of the analyses made of each separate drum as the mixing is completed, and I have those here with me.

I have also prepared a synopsis of the analysis sheets of the shipments that were made to Denver.

Defendant's Exhibit 63 for identification is the analysis sheets for each batch of primer for the Royal Oil Company at Denver beginning in September of '52 and terminating at the end of March in '53.

Voir Dire Examination (T1285)

The Motor Royal Company is our only customer of this material. Each of the pages of Exhibit 63 for identification represents tests from one batch. I have no way of knowing whether the material purchased by Mr. Segerstrom came from any of these particular batches, nor do I know how long the Motor Royal Company may keep the material on their premises.

We don't make any roof coating, we just sell that material there and we have our formula number for

(Testimony of Homer M. Schauer.)

it. We don't call it a primer, either. I don't know what they use it for or sell it for at Denver.

Defendant's Exhibit 63 admitted. (T1289)

CK87 is our formula number for this particular mix, and it is made exclusively for the Royal Oil Company in Denver and was sold only to them during the period in question.

The lowest flash point of any of the batches made over this period of time was 90. If the material does not flash at 95, we don't go any further.

Exhibit 64 is two typewritten sheets headed "Summary of Specifications Reports on CK87", which I prepared myself from the specification records contained in Exhibit 63 and others not offered covering the period from August 1951 to May of 1953.

(Objection was made to the introduction or use of Defendant's Exhibit 64 for identification, and the exhibit was withdrawn.) (T1290-1292)

There is no physical connection between any of our gasoline operations at the refinery and the cut-back storage tanks.

In my research work, I have never attempted to mix gasoline with this asphalt preparation, but I have read what may happen.

(Objection was made to witness stating information obtained from literature; overruled) (T1294)

In such mixture, you may get a precipitation or jelling of the asphalt. [242]

Referring to the red line on Plaintiff's Exhibit 27 marked "Gasoline from Roofing Primer," the sol-

(Testimony of Homer M. Schauer.)

vent diluent which produced that test could not have gotten into this asphalt at our plant. This line looks as though it is a mixture of two different materials. The distillation of all our products is similar to these other lines up here on Exhibit 27. They are very straight and don't have this breaking point in here. Our diluent begins to boil above 200 degrees Fahrenheit. This point with the sharp break upwards indicates you have some material in here that boils rather low and, when you boil that material out, you get a rapid rise to a higher boiling material.

In research work in our laboratory I have made graphs similar to this of the diluents used in this cutback asphalt. They have these little dips on the front and on the back end, but it is similar to one of these curves on the top with no break in the middle.

Cross Examination (T1296)

The Motor Royal Company is the only one for whom we manufacture this CK87. Of my own knowledge, I don't know what they use it for. We manufacture other roofing materials at our Casper plant, but not these cutback roofing materials nor other so called cold roofing materials. We do put out materials which we call corites that are blown asphalts which are sold to various customers. They do not contain a solvent [243] and are what is known as a hot application or hot type asphalt.

The asphalt base of CK87 is blown. We put out road asphalts at Casper. The asphalt base for road

(Testimony of Homer M. Schauer.)

asphalt is not blown and it is much softer and contains more fluid. The blowing tends to make the asphalt more viscous. Aside from the blowing, this CK87 material is manufactured in the same way as the road asphalts by taking an asphalt base and blending it with a diluent, but not in the same proportions. It depends upon what type or grade of road asphalt you want. There are some road asphalts that are about the same proportion of asphalt base in diluent as CK87, but the tests are all different:

A flash test is supposed to be a measure of the hazard of a material. Under certain test conditions, it is the temperature at or above which the material is giving off flammable vapors in sufficient quantities to form an explosive mixture with the surrounding air. I don't believe those test conditions will give an indication of what would happen under normal conditions.

If a test showed a material had a flash point of 50 degrees Fahrenheit, a container of that material standing open in a room with conditions favorable in all other respects to an explosion would be giving off vapors which could form an explosive mixture with the surrounding air at temperatures above 50 degrees.

I don't think that flash point is supposed to be the dividing line between the temperature at which a material is safe and the temperature at which it is dangerous. With a material having a flash point of 50 degrees, under your test conditions you can get a flash if you put a spark or flame an eighth of

(Testimony of Homer M. Schauer.)

an inch away. If there were a spark way in the back of the room, you wouldn't get a flash.

This material at 50 degrees would be giving off vapors which would be combining with the surrounding air. If the temperature is hot enough and depending upon the conditions that may surround it, it can combine with the surrounding air in sufficient quantities to be subject to being ignited even at a distance away from the container. The more it rises above its flash point, the more vapors that are being given off and the more the likelihood is there will be an explosion.

Flash point is a relative test. I will agree that a material having a flash point of 50 degrees can flash at room temperature. Whether a material is to be regarded as dangerous above its flash point depends upon how it is going to be used. It gives you an indication of the danger involved and there may be hazard above that temperature, depending on just how the material is handled.

I don't believe I am qualified to answer what [245] precautions are taken in industry when materials are handled above their flash points. At our refinery, we take precautions all over.

I have never heard of the National Fire Protection Association or its Handbook of Fire Protection.

The only tests we make of this material are those shown on the sheets forming Defendant's Exhibit 63. After it is mixed and we find the viscosity is in the right range, we run the complete test. When

(Testimony of Homer M. Schauer.)

the material is being loaded into the tank car or truck, we run a viscosity test, a specific gravity test, and test to see if there is water present.

At our refinery, crude petroleum is pumped into the stills from the storage tanks located across the river. Those storage tanks contain crude oil from many different wells. The fields from which we obtain the crude may be 200 miles away, and the oil comes from the fields in pipes and those pipes merge into one line that is directed into one of these storage tanks. The crude petroleum is then pumped from the storage tanks into these stills and is run through the stills.

From the first still is taken all the very lightest, most volatile parts of the crude. A small portion of the product of the first still is a true gas which cannot be converted into a liquid, and this is sent to the [246] compression plant where the pentanes and butanes are removed and the balance used to feed our furnaces, and so on. For the most part, what is condensed out of the first still ultimately becomes gasoline.

The cutback asphalt is made from the second still, from which point it is sent to intermediate tankage and from there to the cutback tanks if it is to be used for cutback asphalts. If it is not, we can put it into different tanks and blend it and put it in distillate fuels such as heating oils and furnace oils. Sometimes the product from the second still is sent up to the gasoline manufacturing area to be

(Testimony of Homer M. Schauer.)

used in making gasoline, but we very seldom make gasoline out of it.

Before the product of the second still is used in the cutback asphalt, we run a distillation test on it and gravity to see that it is within certain limits. This product will vary, largely depending on how the still is operated as to temperature. The product is made so that its distillation characteristics are very uniform.

The cutback naphtha is made to specifications on the still. We have our own specifications for that. The operation of the still is adjusted to get a certain product at a certain time. The cutback tanks are always filled from the second still and never from the first still as the piping is not connected that way. [247]

By adjusting operations, the product of the second still can be blended to a gasoline. I rather doubt that the product of that still would run a motor car by itself. It would be a very poor motor fuel and I doubt whether it would run an automobile uphill because of its low octane. Raising its octane would not produce a satisfactory motor fuel, but it might run a car.

The "knock" produced in a motor through the use of a low octane fuel is occasioned by pre-ignition or the fact its starts burning before the spark hits the mixture. It is not true that the higher the octane rating, the slower the fuel burns. By increasing the octane rating, you are decreasing the tendency for the fuel to pre-ignite in the combustion

(Testimony of Homer M. Schauer.)

chamber. Gasolines with lower octane ratings will flash without a spark, and when you increase the octane rating, you make the fuel harder to ignite.

One of the reasons the product of the second still is not desirable as a motor fuel is because it ignites too readily. There are a lot of other differences. On a cold day you would never get that material to start a car. You would have to add butanes to lower its flash point down into winter temperatures. On a real hot day you might get your car started with this material.

The material from the second still is heavier than gasoline, but it would have a boiling point within the range [248] of gasoline. Its distillation characteristics would differ. It can be a component of gasoline, but it is not a gasoline according to our definition in a refinery.

(The witness was temporarily withdrawn.)

ELWIN BRADBURY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1325)

My name is Elwin Bradbury; I live at Rathdrum, Idaho, about 30 miles from Spokane, where I am employed as a janitor and bus driver at the Rathdrum schools. I have charge of the building maintenance.

In the spring of 1953, the school district furnished me about 30 gallons of Battleship primer

(Testimony of Elwin Bradbury.)

and roof coating, which I applied to the school buildings in probably October or November. I applied the primer with a brush and covered different leaky parts of the roof. The material had been stored right off the boiler room in a fairly warm place since its receipt some six months prior to its use. I experienced no trouble in spreading it and it was all satisfactory. Later I used the roof coating to patch leaks in the colder weather. I still have some of the roof primer and have used it to patch leaks in cold weather while keeping it in a warm room. [249]

Cross Examination (T1330)

This primer was kept off the boiler room where the temperature was probably 80 degrees and was kept there for some time before I used it. It was applied in the fall directly from the barrel and I had no trouble with it.

Redirect Examination (T1330)

I carried the 5-gallon container up on the roof for application.

Recross Examination (T1331)

I took the material up through the building.

HOMER M. SCHAUER

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued) (T1331)

In our plant, we don't consider anything gasoline

(Testimony of Homer M. Schauer.)

except what is sold for motor fuel. Until it is actually in a tank to be sold as motor fuel, we call it something else, naphtha or something like that.

I have read that if asphalt is cut back with gasoline, it will tend to jell the asphalt, and over a period of time it will tend to make it become more viscous. Gasoline has the light components, like butanes or pentanes, and it can cause it to jell. There are only minute quantities, a [250] few drops in a barrel, of light ends in the product of this second still. If you took a fractionating column, a very precise piece of equipment, you might get a drop of light ends from the product of the fourth still. If you re-distilled the product of the fourth still, you could get off a small amount of material that could be put into gasoline.

If you re-distilled the product from the second still, you might find one drop in a barrel that would have a boiling point of 120 degrees Fahrenheit. Butane has a boiling point of 33 degrees Fahrenheit at standard conditions. What I refer to as light ends are the butanes and propanes. By fractionating the material from the second still, you would get a few drops of butane or propane, materials having boiling points around 30 degrees Fahrenheit. Through the use of the most precise method of extraction, I would say you would get about 1 per cent of material having a boiling point of around 120 degrees Fahrenheit. (T1337)

The small portion having an initial boiling point of 120 degrees from the second still would not pro-

(Testimony of Homer M. Schauer.)

duce the red curve shown on Plaintiff's Exhibit 27 according to the A.S.T.M. procedure. There would be portions in there that would have boiling points of 120 degrees, but they would not show up on an A.S.T.M. distillation. Having taken the material from the primer by steam distillation, you could develop from that material an initial boiling point in the [251] range of 120 degrees Fahrenheit by certain test procedures, but not by this A.S.T.M. method.

If the viscosity of a material of this sort that we are talking about remains the same over a period of two months, while the material is in a closed container and at a standard temperature, the possibility is very great that no solvent has been added. It is possible that you could add solvent and not thin the material.

The material we mix for the Royal Oil Company is not the cheapest product of our refinery. I believe our heavy railroad fuel oils are probably the cheapest product. I know the cost of this product at the refinery, but I do not know what the sales prices are. Its cost would run between five and ten cents a gallon to manufacture.

This material could not be manufactured with a so-called safety solvent because it wouldn't meet the distillation requirements. I don't believe it could be manufactured with a safer solvent, higher flash solvent, or with a solvent in the category of a Stoddard solvent. I don't know whether the addition of small quantities of carbon tetrachloride would make

(Testimony of Homer M. Schauer.)

it safer or not. I never heard of it being added to roofing materials.

In manufacturing this CK87 material for the Royal Oil Company, the asphalt, before it is cut back, has a flash point of 400 to 500 degrees Fahrenheit. We can't use just any [252] solvent when the customer allows a flash point as low as 80 degrees, because the distillation properties we have to meet determine what we have to put in there. You have to design a solvent that has certain distillation properties, and once you get that solvent, its flash point is set. I don't think you could use gasoline as a solvent because you wouldn't meet the viscosity and still be above that flash point of 80 degrees.

When the material is shipped, we don't make any tests to determine the initial boiling point of the solvent or its other characteristics.

Both the line to the gasoline section and the line to the cutback tanks from the second still are controlled by valves and pumps and there could never be an open circuit between the two. The lines are flushed out once in 25 years only and possibly once a year if we shut a battery down.

There are naphthas that flash above 80 degrees Fahrenheit. We make a Stoddard solvent that flashes at 103 degrees at Casper elevation, which I believe is the highest we make. There are other naphthas which flash higher than 103 degrees. The tests shown in Defendant's Exhibit 63 are run according to the specifications of the American Asso-

(Testimony of Homer M. Schauer.)

ciation of State Highway Officials. The flash points shown are 7 of the 15 are 90 degrees and the balance at either 95 or 100 degrees. We use the A.A.S.H.O. specifications because we consider this material in the category of road asphalt. Those specifications call for tests at intervals of 5 degrees, and a material's true flash point may be somewhere in between.

Redirect Examination (T1356)

The pumps on the stills will not run backwards, which means that once a product is pumped into a tank, it has to stay there.

There is no necessity for again testing the material once it has been put in a storage drum as we consider that that product meets specifications and nothing further could happen to it.

The amount of material in our cutback naphtha with a boiling point of 120 degrees, such as that reflected by the red curve in Plaintiff's Exhibit 27, would be a few drops in 100 barrels or less than a tenth of 1 per cent. (T1358) The material indicated by that red curve would probably contain materials that boil below zero degrees Fahrenheit, possibly one-tenth of 1 per cent. By carrying the test procedure down to a fine point, you can get minute amounts of various very light ends.

The product of the second still probably has an [254] octane rating of 40, whereas our motor fuels will be up around 80 or 90. By adding tetraethyl lead, you could increase it to maybe a 50 octane,

(Testimony of Homer M. Schauer.)

which is still very much below motor fuel, and I wouldn't classify it as a gasoline.

In order for the vapors coming off a material with a flash point of 80 degrees to flash when the material reached that temperature, the match would have to be held within about an eighth of an inch above the material; it would not flash an inch away.

At our refinery we have two crude running batteries of six stills each which are in operation most of the year. There are many other old stills that are not in shape to run crude any more and we use them for other purposes now.

The product of the second still is heavier in weight than gasoline.

Propane is used in refining for separating asphalt from the rest of the crude. When propane is added, you get a flocculation, precipitation or curdling, which would tend to make it more viscous. Propane itself is not found in ordinary service station gasoline, but the butanes and pentanes are and they have the same properties. If a cask of the primer was down to the bottom and ordinary service station gasoline were poured in, it might cause a jelling or a thickening of the material. [255]

Recross Examination (T1365)

The product of the second still is heavier than a motor gasoline and aviation gasoline. Its specific gravity is close to the range of gasoline and it is used to make gasoline.

(Testimony of Homer M. Schauer.)

Redirect Examination (T1367)

A winter grade of gasoline contains more of the lighter elements, such as butane and propane, than the summer grade of gasoline.

Recross Examination (T1367)

We don't measure flash points in gasoline, but they may be as low as minus 40 in our winter grade of gasoline, and the summer gasoline may have a flash point above zero.

(The noon recess was taken.)

2 o'clock p.m., Wednesday, May 5, 1954

HOWARD B. HOPPS, JR.

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1369)

My name is Howard B. Hopps, Jr.; I reside in [256] Oklahoma City, and I am a chemical engineer. I was graduated from the University of Oklahoma in 1945 with a bachelor of science degree, and am presently employed by Kerr-McGee Oil Industries, who are engaged in very general practices in the oil industry, including drilling, production, refining and geological work. My principal activity is as a technical advisor to our Oklahoma City office, which involves checking specifications and our ability to meet those specifications, and

(Testimony of Howard B. Hopps, Jr.)

then taking subsequent action as to producing the products.

The Kerr-McGee company owns one refinery in Oklahoma whose principal activity is the manufacture of asphalt, and we are among the first 15 companies in the United States on the amount of this product produced and shipped. We supply roof coating base stock or primer to the Panther Company, but not that which is shipped to the Pacific Northwest. We also supply a number of other companies with cutback asphalts, as well as manufacturing for our own direct sales.

I am familiar with the practices followed in the petroleum industry in placing warning labels on packages containing petroleum products packaged for use by the ultimate consumer. The practice in every instance I know of is to follow the I.C.C. regulations, since that is the only regulation we know of. [257]

Actually, we don't produce any asphaltic material having a flash point below 80 degrees, so we don't place any warning labels. As long as the flash point of an asphaltic material is above 80 degrees, we do not label with a warning label, nor do any of the companies for whom we package or any other company that I know of.

Cross Examination (T1375)

We follow the I.C.C. regulations because that is the only regulation we know of. I am not familiar with what the penalties are for violation of these

(Testimony of Howard B. Hopps, Jr.)

regulations, but I presume there are fines. That is one of the reasons we follow them.

For five and a half years I was chief chemist at our Winwood, Oklahoma refinery, during which time we set up our canning plant. That is where we can the roofing products for the ultimate consumer, and I was very closely associated with all the work and the getting up of the form for our labels, so I know what goes on those labels. Not being in the business very long before that, we followed what other manufacturers did to a large extent.

I don't know for sure whether the companies to whom we supply asphaltic material affix a warning label after its receipt by them. I have seen those same products in the store for sale.

I have heard of Johns-Manville Company, but I would [258] have to see some figures before I would agree it is one of the largest retailers of asphaltic materials in the United States. It is a lot larger than most of the companies whom we supply. I have never seen any of their roofing primer packaged and don't know whether it carries a warning label or not.

I have never heard of the W. P. Fuller Company or the American Tar Company.

Redirect Examination (T1379)

I have seen the products packaged by our company on the merchant's shelf and, as far as I can

(Testimony of Howard B. Hopps, Jr.)

tell, the labels are the same as when they leave our plant.

Recross Examination (T1380)

At any time in my connection with this business, I have never known or heard of any manufacturer labeling any of these roof primers with warning labels where the flash points are above 80 degrees Fahrenheit.

GEORGE I. BILLINGSLEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1380)

I am George I. Billingsley and I am chief accounting officer, Panther Oil & Grease Company, as well as Secretary of the company. The records of the company are under [259] my general supervision and have been since 1943.

Defendant's Exhibit 65 for identification is the record we keep on a yearly basis showing the volume of the different products by domestic sales, and shows the sales for the years ended October '51, '52 and '53. The first column of the exhibit shows the gallons, the third item on each page is the primer, and the last column shows the money received for that number of gallons sold during the year. Prior to November of 1950, we have records which indicate the sales but not the number of gallons, that is, the dollar volume.

Defendant's Exhibit 65 admitted. (T1384)

(Testimony of George I. Billingsley.)

(Defense counsel read the following from Exhibit 65: November, 1950 through October, 1951, domestic sales of Battleship Primer were 377,060 gallons; the following year, 458,292; and the last year, 333,152.) (T1384)

Defendant's Exhibit 66 for identification is the same information for the export department, recapping the various products in the same manner as the domestic and for the same years.

Defendant's Exhibit 66 admitted. (T1385)

(Defense counsel read the following from Exhibit 66: November, 1950 through October, 1951, export sales of primer were 41,740; the following year, 47,067; and the last [260] year, 39,680.) (T1385)

Defendant's Exhibit 67 for identification is a tabulation showing the total sales by years from 1935 through the fiscal year 10-31-53 by dollar volume. We determined the amount of primer involved by taking the three years that we knew the gallonage and obtained a ratio of that to total sales, which was around 14 per cent, and we applied that percentage as an estimated primer sales for each of the years we didn't have the records. The 14 per cent was applied to sales of roof coating.

Defendant's Exhibit 67 admitted. (T1387)

The total gallonage involved for this period was 4,152,941, based on this method of computation.

As head of the department, any protests or com-

(Testimony of George I. Billingsley.)

plaints or refusal to pay for the product are directed to my attention.

(Objection was made to the question: "I will ask you if during the time that you have been associated with Panther Company, you have ever had any claim made against you for any loss or damage by fire from the use of your primer?" on the grounds of incompetency, irrelevancy and immateriality. In the absence of the jury, defendant argued to the Court that evidence of no similar occurrence would be admissible on the matter of proving notice to defendant and as proof the product was not inherently dangerous. Plaintiff [261] contended that if, as plaintiff claimed, the product were inherently dangerous, notwithstanding which there had been no previous fires or explosions, the introduction of such evidence would have the effect of meaning the manufacturer was then given an immunity under the law. The Court ruled that lack of prior complaints would not constitute a complete defense, but that it was evidence material to some of the issues.) (T1388-1394)

(In the presence of the jury, the question was read to the witness, to which he replied "No.") (T1394)

During the same period of time, to my knowledge, there has never been any claim made to the company that the primer was so viscous that it could not be applied by brush for roofing. Likewise, during all this period, our practice of labeling has been substantially the same as that testified to during

(Testimony of George I. Billingsley.)

the trial, and no claim has been made for any loss by fire.

(In a conference before the bench between Court and counsel, plaintiff indicated he proposed to ask the witness whether claim had been made to any company which indemnified the Panther Company; defendant objected as being improper; and the Court ruled such inquiry was objectionable, but that plaintiff might inquire whether claims had been made on account of their products directly or indirectly.) (T1395-1396) [262]

Cross Examination
(T1396)

I know of no claim which has ever been made against the Panther Company having to do with fire caused by this primer, and, to my knowledge, no claim has ever been made to anybody that might be related to my company in some way. There are four subsidiary companies and, if it was a very small matter, they wouldn't call it to our attention. An item of this importance I would know about. I would only hear about the important matters.

I would say that Plaintiff's Exhibit 17 for identification is the original invoice that was sent to Mr. Segerstrom by the Panther Company.

Plaintiff's Exhibit 17 admitted. (T1398)

ROBERT SLOAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1399)

I am Robert Sloan; I reside in Denver, Colorado, which has been my permanent residence for three and a half years.

I received a degree of petroleum refining engineer from the Colorado School of Mines in 1949, and in 1951 I received a degree of master of science, petroleum refining engineer, also from the same school. I am married and am employed by the Motor Royal Oil Company, which I am used to [263] calling the Royal Oil Company and which is the plant that has been referred to as the one that receives the shipments from the Casper refinery, and the plant from which the primer in controversy was actually shipped to the Riverside Warehouse and from them to Mr. Segerstrom.

I was in charge of that company during the period in question and my position is that of chief chemist and plant superintendent. I work under the supervision of Mr. Ralph Uhrmacher of Panther Oil & Grease so far as matters of chemistry are concerned, and have been under his supervision since May of 1951.

On an average, we will employ from 11 to 15 people at the Denver plant, and I am in charge of all production work.

Defendant's Exhibit 68 for identification is an

(Testimony of Robert Sloan.)

exhibit which I prepared showing tests of flash point by the Tag. open cup flash apparatus of the CK87 primer which we receive from Casper, Wyoming and ship as Battleship Primer. I conducted these tests myself and followed the A.S.T.M. procedure for Tag. open cup tests.

Defendant's Exhibit 68 admitted. (T1403)

Exhibit 68 is a very enlarged chart. Six inches on this drawing illustrate one inch on the actual apparatus. What we are illustrating is, while the material may flash at a relatively low temperature under the actual conditions of [264] the flash test, as you bring the source of ignition at distances away from the cup, the temperature to which the material is heated will have to be greatly increased in order to produce a flash.

The A.S.T.M. standard for Tag. open cup test requires the flame to be $7/32$ nds of an inch above the level of the material being tested, or about a quarter of an inch. My first test of flash point was with the flame at that point.

When the material flashes, it is the ignition of the flammable vapor, there is no burning of the material in the cup, and it goes out immediately after the flash.

The material which I used on these tests was a typical sample of the primer involved in this controversy, but not a sample from the barrel shipped to Mr. Segerstrom.

With the ignition flame $7/32$ nds of an inch off the top of the material, I received a flash point of

(Testimony of Robert Sloan.)

94 degrees Fahrenheit. That means the material itself was at 94 degrees and has nothing to do with the room temperature. I then raised the ignition flame a half inch above the surface of the sample and received a flash point of 106 degrees; at three-quarters of an inch, I received 132 degrees; at an inch, 142 degrees. I then raised it to an inch and a half and got 150 degrees; two inches, 168 degrees; and at three inches I ran out of the range of my heating bath. The [265] highest temperature I got was 186 degrees and no flash occurred at that temperature with the flame three inches away from the material.

I not only ran the flames straight above the sample, I ran them on a 45 degree angle out from the test position and on a line level with the top edge of the cup, straight out from the cup. As I went up on the 45 degree angle at half an inch out or approximately just over the edge of the cup, I got 114 degrees before it flashed; one inch out, 146 degrees; an inch and a half out, 172 degrees; and two and a half inches out it would not flash at 186 degrees.

At right angles from the lip of the cup and right at the edge of the cup, the temperature of the sample was 96 degrees before the liquid flashed; a quarter of an inch out from the edge of the cup, 98 degrees; half an inch out, 146 degrees; and at one inch out it would not flash at 186 degrees.

CK87 is the asphaltic material which Standard Oil Company manufacturers to the Panther speci-

(Testimony of Robert Sloan.)

flection and supplies to us as primer. CK87 comes into our plant, is put into storage, is barreled and shipped without change. In manufacturing liquid asbestos roof coating, we take this same base primer, the CK87, and add to it asbestos and certain inorganic fillers, while the Battleship plastic cement is made in much the same manner only an additional amount [266] of asbestos and this inorganic filler is added to thicken it up. In each instance, CK87 is always the base.

Defendant's Exhibit 69 for identification is composed of the analyses reports which Standard Oil sends to the Royal Oil Company covering each shipment of asphalt CK87.

The CK87 is shipped to us in bulk in truck transports. Gasoline is never hauled in the same transports as it would be impossible to use the same equipment without an enormous amount of cleaning.

Voir Dire Examination
(T1412)

Defendant's Exhibit 69 for identification shows the tests of the previous results on the batches and the viscosity that was taken on the tank truck.

Defendant's Exhibit 69 admitted. (T1413)

When we first contracted with Standard Oil Company, which I believe was either August of '51 or August of '52, to supply us the base roof coating stock, we examined every shipment with a complete test. After a length of time, we satisfied ourselves

(Testimony of Robert Sloan.)

that Standard's tests were accurate in all respects. Since that time, we have been making what we call splot checks on the primer. About every fourth or fifth load in, we will pick out one specification or two listed on their specification sheet and run that analysis in our own [267] laboratory. In all the time we have been doing business with Standard, I have never found a discrepancy in their tests.

Every three or four months, I will send to Mr. Uhrmacher at Forth Worth a quart sample of the primer and he will check this sample against his samples and the samples from our affiliate companies. He has never told me there was any discrepancy between the tests made by Panther and my tests or those of Standard Oil.

The sheets contained in Exhibit 69 are sent to us by mail. We also receive records that come with each truckload of the material.

Among other things, Defendant's Exhibit 70 for identification, contains a receiving ticket indicating the material was received at our plant. Then there is a weight ticket which Standard gives us to determine the amount of gallons in each transport, which is usually 4,500 gallons. Then there is what might be called a bill of lading which Standard makes up on each shipment and upon which is written the results of tests which must be completed before that truck can leave the actual physical grounds of the refinery. These tests reflect the viscosity, the specific gravity, the net gallons at 60 degrees Fahrenheit, the net weight of the ship-

(Testimony of Robert Sloan.)

ment, the tests for moisture, and it also shows the number of the tank from which the CK87 was drawn and the [268] temperature at which it was loaded.

This product is usually loaded at from 150 to 200 degrees, and it loses about 10 degrees between Casper and Denver.

Finally, Exhibit 70 contains a bill of lading from the R. B. Wilson Trucking Company, with whom we have contracted to haul the material for us, and this is a combined tank shipping notice and loading report. It is actually a confirmation of the order which Standard Oil sends to us.

Defendant's Exhibit 70 admitted. (T1420)

If a truckload of this material arrives at our plant in the daytime, one person whom I have designated to take care of the unloading will go out and hook the truck up with an unloading pipe which will transfer the CK87 into one of our storage tanks by means of a pump through a valve network. If the material arrives at night, the unloading hose is made available to the truck driver. The outside unloading valve is locked, the switch on the pump is locked. The driver has been previously instructed as to how to operate the system, so he will hook this unloading hose up to his trailer, unlock and open the unloading valve, and then with a key turn on the pump which will unload it into a tank.

The tank into which the material is unloaded is called an outside storage tank, which is heated by

(Testimony of Robert Sloan.)

steam coils having a temperature of around 219 degrees. [269]

From the outside storage tank, the CK87 is pumped into our manufacturing plant into what we call an inside storage or barreling tank having a capacity of 550 gallons. It will then be drawn out of this tank by gravity flow into whatever size container we are filling at that time for ultimate delivery to the consumer. The most usual packages are 5-gallon pails, 30-gallon drums and 55-gallon drums.

In manufacturing the asbestos roof coating, we have two roof coating mixers alongside our primer barreling tank consisting of a 1000-gallon tank with paddle agitation. The primer is piped past the primer barreling tank into one of these asbestos roof coating mixing tanks, and the asbestos and fillers are incorporated into it. The same procedure is followed in manufacturing the cement, except the equipment is a little different because the cement is more viscous.

The CK87 is maintained at a temperature of about 160 degrees during the three processings described, as we try to keep the material warm enough for economical handling. It is very difficult to mix the ingredients at lower temperatures.

We have one 55-gallon drum of gasoline at our plant, which is kept locked so that it won't get into something inadvertently and so that the boys won't use it to clean floors and things of that nature. It would be absolutely impossible [270] for any form

(Testimony of Robert Sloan.)

of gasoline to be mixed with the CK87, either en route in the trucks or during processing.

In addition to the Panther Company, we also deliver CK87 to the American Lubricants Company, Dayton, Ohio; the Panther Oil & Grease Manufacturing Company of Canada at Moose Jaw, and occasionally to another company, and we also package for ourselves, the Royal Oil Company. In each case, we attach to the container the label furnished by the respective companies, which is the only label that goes on the drum.

We package aluminum paints having a flash point below 80 degrees Fahrenheit which we label with the I.C.C specified red label indicating it is flammable.

The consignee of Battleship products in the Pacific Northwest is Riverside Warehouse Company in Spokane. They, in turn, deliver the products to Idaho, Washington and Oregon. In shipping to the Riverside Warehouse from our Denver plant, the oldest material is always shipped out first.

I have records of these shipments to Riverside Warehouse covering the period from September, 1952 through March, 1953.

(The shipping data was then given by the witness.) (T1427-1429)

(By agreement, Howard B. Hopps, Jr. recalled.)

HOWARD B. HOPPS, JR.

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued) (T1430)

I am quite familiar with the packaging operations at my company, Kerr-McGee. We package for various concerns and ship the material out to distributors. We package these petroleum products in everything from pint cans up to 55-gallon drums. We do not package any material with a flash point below 80 degrees as we have no call for anything of that nature. Primer is the material we handle with the lowest flash point. We do not package gasoline or anything similar to gasoline, and I don't believe I have been around plants where materials were packaged with flash points below 80 degrees Fahrenheit.

ROBERT SLOAN

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination

(T1433)

The aluminum paint which we package at the Motor Royal Company has a flash point which just splits 80 degrees. Sometimes it is below, sometimes it is above. It is packaged in 5-gallon cans only and is shipped by railroad and motor carriers. The 5-gallon containers are not placed [272] in boxes for shipment, but are banded into the cars so they won't shift or move. I am not aware that when

(Testimony of Robert Sloan.)

small containers are placed in a box for shipment that the I.C.C. regulations only require a warning label on the outside carton.

I don't know that the stock of the Royal Oil Company is held by the stockholders of the Panther Company. I own 50 shares. I testified that Panther bought Motor Royal in May or June of 1951. Subsequent to that time, I am not sure of this but I believe the stock of Motor Royal was sold back to Motor Royal.

I don't know that the American Lubricants Company is wholly owned by the Panther Company and have never heard that it was in so many words.

The cutback asphalt ordinarily comes from the refinery in tank trucks and is unloaded by hose. The hose is grounded to prevent the accidental discharge of static electricity which will form a spark.

We package the primer and aluminum paint in the same building, which building has "No Smoking" signs and vapor-proof lights.

The Tag. open cup used in making the tests shown in Exhibit 68 is about two inches in diameter and two and a quarter or two and a half inches deep. The sample cup is filled with the material and then a leveling device is swept [273] over the top of the cup until it is just touched by the fluid being tested. The leveling device rides on the top of the cup and has a protrusion of about an eighth of an inch down from the lip so that the level of the liquid is an eighth of an inch down from the

(Testimony of Robert Sloan.)

level of the lip of the cup. The cup will then contain one, maybe two ounces. The tests were made in our laboratory in Denver under a draftless hood.

Under normal conditions, the vapors from this material are heavier than air. The vapors will not come over the lip of this cup and down to the base of the floor in a draftless condition, because of the heat convection currents coming up around the sides of the cup, the hot air is rising and carrying the vapors with it. If there were no heat directly under the cup, the normal tendency of these vapors would be to go down to the floor.

The cup is immersed in a water bath with a burner below the water bath. There is a uniform heat coming up alongside the cup from the water bath, which would cause enough convection so that the vapors wouldn't come down to the floor. Because of the manner in which this equipment is designed, the vapor would not get beyond the range of the convection.

Exhibit 68 indicates that right at the edge of the cup the flash point was 96 degrees, and a quarter of an inch out beyond the edge of the cup it was 98 degrees. It do not [274] believe that indicates the vapors are spilling over the edge. The exhibit indicates you have to go up approximately an inch to the lip of the cup from the surface of the liquid and then over a further two and a quarter inches to reach the point where 98 degrees is shown, or the same distance for the vapor to travel as the point where the 106 degree reading was obtained;

(Testimony of Robert Sloan.)

but have you ever seen a substance of this type vaporize, like a pan of boiling water? It does not prove that the vapors are spilling over the edge of the cup.

I believe in a draftless atmosphere there would be enough material in the cup to form a considerable amount of vapor. I believe comparable findings would be had if there were a washtub of the material in this room. A 55-gallon washtub of this material sitting in this room at a temperature of 100 degrees for about four hours would give off a pint of vapors. A pint of vapors in liquid form would make approximately 300 cubic feet of an explosive mixture. I don't believe it would make 300 cubic feet of the vapors. I can't quote the formula directly, nor do I have a book with me from which I could determine it.

I had never heard of the National Fire Protection Association's Hand book of Fire Protection until you mentioned it yesterday. I never heard the formula expressed as: "The cubic feet of vapor evaporation of one gallon of solvent [275] equals 8.33 times the specific gravity over .075 times the vapors density." That is not taught in the normal physical chemistry courses.

The explosive mixture would be in the area of about 2 per cent mixture with air, which would mean that in this 300 cubic feet of explosive mixture, there is only 6 cubic feet of vapors. At 140 degrees Fahrenheit, you would only create 6 cubic feet of vapors from a 55-gallon drum of this mate-

(Testimony of Robert Sloan.)

rial. I base that on the result of experimentation. I don't know how much vapor would be obtained if the material were allowed to stand for four hours as I have not run experiments on that. My test was over a period of half an hour. I raised the temperature 2 degrees a minute up to 140 degrees and calculated the amount of vapors by the difference in weight of the sample before and after heating, which amounted to approximately a pint of naphtha from the primer, or the equivalent of a pint from 50 gallons. So long as the tub is sitting open, it is giving off vapors, the same as this glass of water is giving off vapors.

At our plant we always ship out the oldest material first, but I don't know anything about what the Riverside Warehouse does.

We make tests of about every fourth shipment received from Standard Oil. The asphalt is blown by Standard and nothing is added to it. The asphalt is then cut back [276] with solvent and shipped to us. The only difference between the primer and the roof coating is that in the latter we add asbestos and inorganic mineral dusts which tend to cement the product. The primer is not manufactured under a patent, other than it is manufactured to the Panther's specifications.

We check Standard's testing on about every fourth shipment by testing the specific gravity, the viscosity, the flash point, and running a distillation test, but we do not necessarily make all these tests on each fourth shipment. We check distilla-

(Testimony of Robert Sloan.)

tion about every other test to see what type of solvent is being used, if it is a solvent conforming to our specifications. If too much were in the low boiling range, we would know that too light a solvent had been used. Our first check point is 374 degrees, and then we check at 437, 500 and 680 degrees to see that we are getting approximately the correct amounts at each of those temperatures, which is all we do with the solvent portion. Then we check the softening point and penetration and ductility.

If there were any light ends in this solvent, the initial boiling range would be too high. If we got something over specifications off at 374 degrees, it would depend on how the rest of the distillation looked as to whether it was due to the presence of light ends.

The specifications permit a 7 per cent variation [277] in the amount of material distilled over at the various given temperatures. If 30 per cent were obtained on the first bracket and then 32 per cent off at 500 degrees, that would tend to indicate a great deal of light ends. If you got a relatively large percentage off at the first check point and then relatively less off at the succeeding higher bracket, still within specifications, that would tend to indicate light ends. If we were running a distillation as a spot check on this and something peculiar like that happened, then we would follow it up with the complete examination, correlating this result to other results, which would indicate

(Testimony of Robert Sloan.)

whether there were light ends in it or some other possibility.

In running the distillation tests, we are not checking specifically for light ends. In refinery practice there would not be light ends present in the material. We are checking the material because we are selling a quality product to a customer and we want to make sure he is getting what he is paying for. We don't necessarily run the distillation test every fourth time.

We have run tests on the solvent portion after distillation to see what its boiling point was. I believe I misled you when I testified if anything would develop from the distillation test indicating something was wrong with the solvent, we would check the solvent. If something should [278] show up in the distillation that would indicate something other than normal, we will completely check the sample to see where the trouble is. The trouble might be in the asphalt portion or it might be in the solvent. There doesn't have to be something wrong with the distillation test for us to run a test on the solvent portion. I have never found anything in my testing that was in contradiction to something on Standard's report sheets.

If a naphtha with a flash point of 50 degrees had been used in the tests shown in Exhibit 68 instead of the primer, the flash temperature of the naphtha would be much lower than that indicated at the 186 degree level. I don't believe it would be over 100 degrees, but I have never tried it. It would not

(Testimony of Robert Sloan.)

elevate in the same proportion that is shown on Exhibit 68. I have tested gasolines and naphthas, though not in that manner, and I believe I know something of their characteristics.

It is true that if there were gasoline sitting around in tubs in this courtroom and permitted to stand over a period of time, that this whole courtroom would blow up providing there was a spark or flame to ignite it.

The only means of checking the batch out of which the material received by Mr. Segerstrom was shipped is that we have the range of carloads which this material did come out of. I don't know how long Riverside Warehouse held it, [279] only that in order for us to get an order for merchandise to be shipped to them, the stock must be relatively depleted in the warehouse.

Redirect Examination (T1466)

When we first began to deal with Standard, we checked their analysis sheets against actual physical tests which were run in our laboratory and found that they were consistently correct. Since that time, we have made tests from time to time to see that they continue to be accurate, including tests to determine the presence of light ends, and have found none present.

Recross Examination (T1467)

We have run tests from time to time on the solvent itself as to its boiling point.

* * * * *

(Whereupon, a witness was called by defendant who testified to matters relating to damage aspects of the case (T1468). Objection was made to admission of certain of his testimony (T1470), the jury was excused, and a discussion was had between Court and counsel on the legal question involved (T1471-1485). A ruling was deferred, and the cause was adjourned until 10 o'clock a.m., Thursday, May 6, 1954.) [280]

10 o'clock a.m., Thursday Morning, May 6, 1954

(Out of the presence of the jury, further discussion was had between Court and counsel dealing with damage features of the instant cause (T1486-1504). During the course of this discussion, plaintiff advised the Court a requested instruction was being submitted which would advise the jury that the I.C.C regulations had nothing to do with the obligations, if any, of the defendant to the plaintiff as to use of warning labels; that they were enacted solely to govern the transportation of dangerous articles. Defendant urged that several of its witnesses had testified the said regulations provided the only measure or standard of safety known in the industry. The Court stated he did not think the regulations set up the standard of care so far as the relationship between manufacturers and consumers was concerned, but that the evidence relating to them was properly before the jury for certain purposes, and that an instruction would be framed and given accordingly.) (T1504-1511)

JOSEPH C. GILMORE

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1512)

My name is Joseph C. Gilmore; I have lived in [281] Spokane for 10 years this last time; I am 50 years old and am employed by the Riverside Warehouse Company as Superintendent and have been for 6 years.

My duties consist of caring for the merchandise, supervising its unloading when it comes in, and shipping it out on order. Except in cases where merchandise is ordered out of cars by the shipper, we put the old merchandise to the front and always put the new merchandise in the back.

I am familiar with Battleship products manufactured by the Panther Company, and they have been stored in our warehouse during the entire 6 years I have been there. When a new shipment of merchandise comes in, we check our older stock to get a double check on the amount on hand and move it out on to the warehouse floor. We then put the new merchandise in and that is checked in and we put the old merchandise in front of it and it is shipped out first.

Cross Examination (T1515)

Orders for shipment of Battleship products from the warehouse come from the Panther Company. At the beginning of every month there is a physical count made of the warehouse stock which is sent to the Panther Company.

(Testimony of Joseph C. Gilmore.)

I do not move the barrels myself, but supervise the work of the 6 men who do so. [282]

(The witness on damage testimony withdrawn in favor of Mr. Gilmore resumed the stand and testified further.) (T1516-1540)

(Defendant's Exhibits 72 and 73 for identification, being regulations of the Washington State Department of Labor and Industries and an amendment thereto, were offered in evidence with the explanation they were not being offered as evidence of negligence per se but were admissible as evidence of negligence, numerous authorities being cited. Plaintiff argued the regulations had no application to other than those named in the act. The Court ruled the offer was not timely made; that the effect of the admission of the exhibits or submission of an instruction embodying the regulations would be tantamount to instructing the jury a violation of them would be negligence per se; and that the regulations had no application to the plaintiff and his employees, and the exhibits were rejected.) (T1540-1559)

(The noon recess was taken.)

2 o'clock p.m., Thursday Afternoon, May 6, 1954

(Defendant advised the Court the regulations contained in Defendant's Exhibits 72 and 73 had only been brought to its attention on either the 16th or 19th of April, 1954.) (T1560-1561)

Defendant rests. (T1561) [283]

Rebuttal

(John Norman Segerstrom, plaintiff herein, was recalled in rebuttal and testified to matters relating to damages.) (T1561-1582)

RHEA ROSENBAUM

recalled as a witness in rebuttal, having previously been sworn, testified further as follows:

Direct Examination

(T1582)

Pursuant to request, I took a sample yesterday from the barrel of primer at my place which has been marked Plaintiff's Exhibit 76 for identification. This sample was taken from the same barrel that has been discussed for several days in this case and from which other samples were taken.

(Objection was made to the question: "And how does it compare in thickness as of yesterday with its thickness at the time you first opened the barrel back on July 7, 1953 for the purpose of starting to apply it to your roof?" on the ground of its being improper rebuttal; overruled.) (T1583-1584)

I think it is about the same probably as it was July 6th, the first day I opened the barrel, before it was taken out in the sun.

(Objection was made to admission of Plaintiff's [284] Exhibit 76 for identification as not proper rebuttal; overruled.) (T1585)

Plaintiff's Exhibit 76 admitted. (T1585)

J. M. KNISELEY

having previously been sworn, recalled in rebuttal, and testified as follows:

Direct Examination

(T1586)

Pursuant to request, Dean McGivern of Gonzaga University and I went out on the market in Spokane yesterday and acquired various types of asphalt roof coating.

Voir Dire Examination

(T1587)

I did not obtain the specifications of the manufacturers of the brands of asphalts secured. We ran tests on the materials last evening and I have my pencilled notations relating to the tests.

(Objection was made by defendant that the evidence being offered was not proper rebuttal; overruled, with a continuing objection to the line of testimony being allowed.) (T1587-1588)

Plaintiff's Exhibit 77 for identification is one of the brands of asphalt roof coating which I purchased yesterday and on which I ran a flash test last evening. The product generally appears to be the same type of material as Battleship Primer.

(Upon further objection, the jury was excused, and defendant argued that the manufacturer's specifications would be the only proper evidence; that a single can of a product would not be proper proof of the point sought to be established nor proper impeachment of defendant's witnesses. The Court

(Testimony of J. M. Kniseley.)

ruled the offer had probative value and the objection was overruled.) (T1589-1593)

The flash point of the material contained in Exhibit 77 for identification was 116 degrees Fahrenheit.

Plaintiff's Exhibit 77 admitted. (T1594)

(Plaintiff stated to the jury that Exhibit 77 was Johns-Manville Regal Roof Coating; "Handling Instructions: Keep away from open fires.") (T1594)

Plaintiff's Exhibit 78 for identification is one of the materials I purchased yesterday and a flash test was also run on it. The material in this exhibit contained some fibers, but otherwise it was a cut-back asphalt. Its flash point was 136 degrees Fahrenheit. I think we got this can at Fuller's.

Plaintiff's Exhibit 78 admitted. (T1595)

(Plaintiff stated to the jury that the label on Exhibit 78 contained the following: "Pioneer-Flintkote Asbestos Roofing Coat"; that under directions for use in small letters appeared: "If it is too heavy, thin slightly with [286] naphtha, gasoline or kerosene"; in capital letters: "Do Not Heat Over Direct Fire.") (T1595)

Plaintiff's Exhibit 79 for identification is one of the products I purchased yesterday at Mansur Supply and on which I ran a flash test and obtained a flash point of 85 degrees Fahrenheit. It is similar to Battleship primer.

Plaintiff's Exhibit 79 admitted. (T1596)

(Plaintiff stated to the jury that Exhibit 79 was Celotex Asphalt Roof Coating manufactured by the

(Testimony of J. M. Kniseley.)

Celotex Corporation; that under directions in capital letters appeared: "Caution: Do Not Heat Near Fire.") (T1597)

These flash tests were run at Gonzaga University in collaboration with Mr. McGivern.

Plaintiff's Exhibit 80 for identification is one of the products I purchased yesterday and on which I ran a flash test and obtained a flash point of 130 degrees Fahrenheit. It is very similar to Battle-ship primer.

Plaintiff's Exhibit 80 admitted. (T1598)

(Plaintiff stated to the jury that Exhibit 80 had a label affixed thereto containing the following "Dri-N-Tite, The Modern Method of Roof Resurfacing, Primer Black. Caution: Keep Away from Open Flame and Use in a Well-Ventilated Place.") (T1598) [287]

Cross Examination (T1598)

The substance of each cautionary instruction in Exhibits 77 through 80 is not to heat over an open flame, which is essentially the same phraseology as contained in the instruction book, Defendant's Exhibit 18.

JAMES G. McGIVERN

having previously been sworn, recalled in rebuttal, and testified further as follows:

Direct Examination (T1600)

I accompanied Mr. Kniseley yesterday in purchasing the asphalt products.

(Testimony of James G. McGivern.)

(The defendant was allowed a continuing objection to the line of testimony.) (T1600-1601)

I also worked with Mr. Kniseley last evening in running flash tests on these materials contained in Exhibits 77 through 80, and the flash points obtained were as testified by him.

Plaintiff Rests. (T1601)

(A witness was called by the defendant in rebuttal on damage features of the instant cause.) (T1602-1606)

Defendant Rests. (T1606)

(Plaintiff's Exhibit 41 withdrawn.) (T1607)

The jury was excused until 1:30 o'clock p.m., Friday, May 7, 1954, and the defendant moved that Plaintiff's Exhibit 27 be withdrawn from the consideration of the jury and stricken from the record; that all testimony pertaining to Exhibit 27 and to the contamination or dilution of the primer involved by the addition or intermingling of light ends (aviation gasoline or winter gasoline) be also withdrawn from the consideration of the jury; on the ground the plaintiff had not sustained the burden of proof to overcome the presumption in law that the contamination occurred after the material left the control of the manufacturer where a course of manufacture had been proven.

The Court ruled the matter a factual issue to be determined by the trier of the facts and denied the motion. (T1609-1615)

The defendant moved the Court for a directed verdict in favor of the defendant as follows:

"All parties having rested, the defendant moves that the Court direct the jury to return a verdict for the defendant on the following grounds:

"1. That the plaintiff, under the law and the facts, is not entitled to damages in this case;

"2. That the plaintiff has failed to offer sufficient evidence of legal damage to his property;

"3. That no evidence of negligence has been established [289] in the way of negligence of the defendant, because:

(a) The defendant could not reasonably anticipate the action of the plaintiff resulting in a fire in his warehouse;

(b) The defendant could not reasonably anticipate the actions of the plaintiff's employees resulting in said fire;

(c) It is shown that the defendant followed the usual practice of persons engaged in the same industry so far as label warnings are concerned;

(d) That the asphalt roofing material is a well known, standard product and is not inherently dangerous; and

(e) That the defendant gave all necessary warning to not heat the material by way of instructions.

"4. The plaintiff was guilty of negligence which materially contributed to his injury, in that:

(a) He failed to read the instructions given to him;

(b) He failed to transmit those instructions to his employees charged with using the plaintiff's material; and

(c) That plaintiff failed to follow the [290] instructions given to him, but violated the same.

“5. That the plaintiff’s employees were negligent as a matter of law in building a fire under the primer furnished by the defendant, knowing that such action was dangerous and knowing that the same might cause fire under the circumstances;

“6. That if the plaintiff determined that defendant’s primer was too stiff to use, it was his duty to communicate with the manufacturer;

“7. That the plaintiff’s employees were negligent as a matter of law in building a fire under the primer when they learned that it had become thinner after sitting out of doors in the open air;

“8. That any danger in connection with the use of the material was created by the plaintiff himself using the same improperly and contrary to directions; and

“9. That if any substance other than shown in the formula, by accident or intention, got into the said primer, it happened during the time it was under the control of the plaintiff and after it left the control of the defendant.” (T1616-1618)

(The motion was denied.) (T1631)

Extensive argument was had upon the propriety of the giving of Plaintiff’s proposed instruction as follows: [291]

“You are instructed that there is a statute in the State of Washington (Revised Code of Washington 70.74.300) which provides as follows:

‘A person who puts up for sale, or who delivers to a warehouseman, dock, depot or common carrier, a

package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you should find from a preponderance of the evidence that the Primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant in such event would be guilty of negligence for failing to label the Primer in the manner required by that statute, and if you should further find from a preponderance of the evidence that the fire damage to plaintiff's property proximately resulted from such failure to label, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of negligence which proximately and materially contributed to the occurrence of such fire damage."

Ruling reserved. (T1618-1629) [292]

Further discussion was had regarding measure of damages, following which an adjournment was taken until 11:30 o'clock a.m., Friday, May 7, 1954. (T1629-1635)

11:50 a.m., Friday Morning, May 7, 1954

Out of the presence of the jury, defendant submitted an additional requested instruction pertaining to the regulations of the Washington State Department of Labor and Industries, the substance of which had been offered and rejected as Defendant's Exhibits 72 and 73. The Court refused to give the instruction. (T1636-1638)

The following proceedings were had dealing with plaintiff's requested instruction incorporating Revised Code of Washington 70.74.300 (quoted on preceding page):

"The Court: In regard to the statute which the plaintiff has requested an instruction on—it is Section 259, Page 967, of the Laws of Washington, 1909, Chapter 249—I have given that considerable thought and attention and I see no way that I can avoid giving an instruction on that. I put it in that way because it seems peculiar to me that the statute hasn't been enforced, that it should be applicable in a case of this kind, but, of course, it is neither my duty nor my function nor in my power to try to wipe from [293] the statute books of the state what I regard as perhaps obsolete statutes that should be repealed.

"I can find no express repeal or repeal by implication of this statute, and certainly people far more expert than I am in that field have taken the same view of it because it has been included in two codifications—three, I believe it is—the Remington Revised Statutes and another later Remington's

Code and the present R.C.W.—and it does by its terms apply to this situation.

“And so far as the matter of the Federal Government having pre-empted the field by its legislation giving the Interstate Commerce Commission the power and authority to fix standards for the transportation of inflammables and dangerous explosive materials, I don’t see how you can say they pre-empted the field because the fields are wholly different. The Federal statute applies to interstate commerce and interstate commerce only, and if we assume that this is a transportation statute, as only the bare title of Section 254 would indicate, it would be intrastate transportation, but if you read this statute, it isn’t even a transportation statute. It makes it unlawful for every person to put up for sale or deliver to a warehouseman, dock, depot, or common carrier, a package, cask or can containing the prohibited ingredients. So that all we have here, we don’t even have commerce, we have a prohibition [294] against putting up for sale and delivering to a carrier or to a dock, depot or warehouseman, and that could be done without in any way involving even intrastate commerce, so I can’t see how you could possibly say the field has been pre-empted.

“By its terms, it applies; it hasn’t been repealed expressly, I don’t believe by implication; and regardless of what I may think of the statute, I have no control over the matter, as I see it.

“Mr. Graves: May I make an observation in that connection, your Honor?

"The Court: Yes.

"Mr. Graves: We are also, of course, taking the position that that applies to the unadulterated benzine, gasoline or naphtha.

"The Court: I assumed so, too.

"Mr. Graves: And not just the small percentage of naphtha.

"The Court: No, but what have you to say as to 'or other explosive or combustible substance,' which I assume would mean of a like character?

"Mr. Graves: Well, I am not arguing with your Honor. I think, in that connection, that the definition of 'explosive' in the 1931 Laws must govern, and instead of instructing the jury that this is the law pertaining to [295] this—I don't know exactly what the instruction is, I don't have it in mind—at the most that could be done would be to define what an explosive is. I would feel that clearly we do not fall within the purview of the statute, because this is neither gasoline, benzine or naphtha. Then you can instruct the jury as to what is an explosive.

"The Court: Well, your explosive statute is a different statute for different purposes, for storage, and doesn't apply in its terms or by its context to this one, and the plain implication here is that they regard these substances as explosives for the purposes of these statutes, because they name them and then say 'or other explosive or inflammable substance.'

"Mr. Graves: The word 'combustible' is, of course, quite different from 'inflammable,' too.

“The Court: Well, obviously, the legislative intent is to regard these things as explosives for the purposes of these statutes or they wouldn’t say ‘other explosive,’ it seems to me, but that is the view I take of it, which others might very well regard as erroneous.” (T1638-1641)

The Court further advised counsel of the remainder of the instructions to be given to the jury. (T1641-1642)

The noon recess was taken. [296]

1:30 o’clock p.m., Friday Afternoon, May 7, 1954.

Out of the presence of the jury, there was a lengthy discussion between Court and counsel relating to Plaintiff’s Exhibit 27. On motion, the Court granted leave for defendant to withdraw motion previously made to strike Exhibit 27 from the record and all testimony pertaining thereto. (T1643-1653)

Oral argument was made to the jury, after which the following instructions were given by the Court:

INSTRUCTIONS TO THE JURY

(T1655-1679)

“Now, ladies and gentlemen of the jury, now that you have heard the testimony of the witnesses and the argument of counsel, it becomes my duty to instruct you upon the rules of law which you are to follow in arriving at your verdict in this case. It is your duty to decide the issues of fact presented, but you should take my instructions as a true and correct statement of the law involved.

“You should consider the instructions as a whole and not attach any special importance or emphasis to any particular part of them.

“Now, members of the jury, I wish it were possible for me to discuss informally, tell you in a few brief words, what the law is and the rules of law that you should follow in your deliberations in this case, but, unfortunately, lawsuits are just not that simple and the relationship of individuals and parties in cases of this kind is not that simple, and it is my duty to instruct you fully and correctly and as accurately as I can about the rules of law that you are to follow, and they are, in many instances, not simple and I am afraid will be difficult for you to understand. [298]

“I think it might be helpful, however, at the outset before I read these formal instructions to you to just explain this briefly. I think jurors must get the idea sometimes that a judge is giving inconsistent and even contradictory instructions, but we try not to do that and I think you will find that we are not doing it, if you consider that it is your sole function and responsibility to decide the facts. And where there is conflict in the facts and the evidence, as there always is in a difficult and hard-fought lawsuit such as this, where there is a conflict in the evidence, then it is for you to make the decision and decide which line of testimony or evidence you shall follow, so I must give you instructions that fit either finding. I must tell you what the law is if you find the facts one way and what the law is if you find the facts the other way, and you

will find that that is what I do in many of these instructions.

“I have to make the assumption that you may find the facts in favor of the plaintiff’s contentions; if so, the law that you should apply will be so and so. On the other hand, you may find the facts according to the contentions of the defendant, so I must also tell you what the law will be in case your finding is that way.

“Now in considering whether you should return a verdict for the plaintiff or for the defendant in this case, [299] I suggest that you first consider whether or not, under the evidence and the instructions which I shall give you, the defendant is responsible or liable for the loss by fire of the plaintiff’s property. If you should find that the defendant was not liable, then that would end your inquiry and your verdict should be for the defendant. If, however, you should find that the defendant is liable, then you should consider, in the light of the evidence and the Court’s instructions, what amount you should allow the plaintiff for his loss and damages.

“Now the attorneys for the parties here, the plaintiff and the defendant, have informed you quite fully, I think, that their claims, respective claims or contentions are, have done so in their opening statements and in their arguments, and I shall not attempt to restate them comprehensively or accurately, but for the purpose of convenience I will briefly summarize them, as follows:

“At the outset, the plaintiff claims and contends

that the defendant's Battleship roof primer was a highly inflammable, explosive and inherently dangerous product; that the defendant knew or should have known that it was inherently dangerous, and was negligent in that it did not properly and adequately warn the plaintiff of the dangerous nature of the product; that the defendant was further negligent in that the product could not be applied without [300] heating, which fact was known or should have been known to the defendant, and that the defendant further knew or should have known that heating would render the material extremely dangerous, subject to explosion of gases volatilized from the material, and that the destruction and loss of plaintiff's property and the damage which he claims proximately resulted from such negligence on the part of the defendant.

"The defendant denies that its product was inherently dangerous or that the defendant had any reason to know or believe that the product was dangerous, or that the defendant was in any respect or particular negligent or that any negligence on its part proximately resulted in any loss or damage to the plaintiff; and the defendant further affirmatively claims and contends that any loss or destruction of property and damages that the plaintiff suffered was the result of plaintiff's own contributory negligence in that the defendant gave plaintiff written instructions as to how to use Battleship and, if such instructions had been followed, no fire would have occurred; and that the employees of plaintiff exposed the primer in question to an open fire inside

a building, realizing that such action was dangerous; that the plaintiff assumed the risk and hazards involved and is responsible for his acts of negligence and cannot recover.

“The plaintiff on his part, by way of reply, denies [301] that he was guilty of any contributory negligence which proximately resulted in his loss or damage.

“Now the plaintiff has the burden of proving by a fair preponderance of the evidence his claims or contentions, both as to liability and as to damages; and the defendant on its part has the burden of proving by a fair preponderance of the evidence its affirmative claims and contentions that the plaintiff’s loss was due to his own negligence.

“The expression ‘fair preponderance of the evidence’ means the greater convincing force or weight of the evidence. It means that which appears to be the more reasonable or probable happening or event. It does not necessarily mean the greater number of witnesses testifying for or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means, taking all the evidence on that issue into consideration, that the convincing weight and force of the evidence is in favor of one side against the other.

“The basis of this action is negligence. Negligence is the failure to exercise reasonable and ordinary care. By the term ‘reasonable and ordinary care’ is meant that degree of care which an ordinarily careful and prudent person would exercise under the

same or similar circumstances. [302] Negligence may consist of the doing of some act which a reasonably prudent person would not do or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is want of due care or ordinary care in the particular situation.

“‘Due care’ and ‘negligence’ are relative terms, and what in one situation might be due care might be negligence in another; so that the measure of duty is always reasonable care and caution under the particular circumstances presented.

“Before the defendant can be held liable in damages, you must find from a fair preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the plaintiff’s injuries and damages.

“Contributory negligence is negligence upon the part of the plaintiff which proximately contributes to his loss and damage, and the term ‘negligence’ in this connection has the same meaning as previously just defined by me.

“Contributory negligence is a complete defense, and if you find that the plaintiff was guilty of contributory negligence, as I have just defined it, then your verdict should be for the defendant.

“Now this term ‘proximate cause’ of an injury, as [303] I have used the term, means a cause which, in a natural and continuous sequence, unbroken by any new independent cause, produces the injury and without which the injury would not have oc-

curred and would not have been sustained. In this case, of course, when I say 'injury,' I mean injury to property, damage to the property by the fire.

"You are instructed that, aside from any requirements of a statute, a manufacturer who puts up and sells a material which, when made according to the manufacturer's formula, is inherently dangerous for the use for which it was supplied or a use to which the manufacturer has reason to expect it to be put, that the manufacturer has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn.

"You are further instructed that the manufacturer is charged with knowledge of the contents of containers put up by such manufacturer for sale to the public, when put up in accordance with the manufacturer's formula, and it is no defense for the manufacturer to say that he did not know of such dangerous nature of the contents.

"You are further instructed that where a corporation puts out a material under its own label and as having [304] been manufactured by such corporation, the corporation is liable as to such material as though it had actually manufactured the material, and it is no defense that the material has, in fact, been manufactured by another.

"You are therefore instructed that if you find from a preponderance of the evidence that the ma-

terial sold by the defendant to plaintiff was inherently dangerous, when made in accordance with the defendant's formula, for the use for which it was supplied or the use to which defendant had reason to believe it would be put, and that defendant failed to warn plaintiff adequately of such danger as to the material, and that the fire and damage to the plaintiff's property proximately resulted from such failure to warn adequately, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of contributory negligence which proximately and materially contributed to his damage, to the damage to his property.

“You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

‘A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon [305] in a conspicuous place in large letters the word “Explosive,” shall be guilty of a misdemeanor.’

“You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the fore-

going statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute; and if you should further find from a preponderance of the evidence that the fire damage to plaintiff's property proximately resulted from such failure to label, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of contributory negligence proximately and materially contributing to the occurrence of such fire damage.

"Now in qualifying some of the other instructions, I will have occasion to refer to this statute and I will refer to it as the Washington statute, because it is the only one that I shall read to you, and that means, without my repeating it each time, that where I refer to this statute, if you find that this statute does apply and you decide [306] that the plaintiff should have a verdict under this statute and under this instruction, then the other instruction does not apply; but if you find that this is not applicable, that this instruction is not applicable with reference to the statute, then the other instruction I shall give you is to be applied with full force.

"There has been some reference to the regulations of the Interstate Commerce Commission during the evidence. You are instructed that the regulations of the Interstate Commerce Commission as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such materials in interstate commerce, and you are

not to regard such regulations as fixing the standard of care which a manufacturer of an inherently dangerous, flammable material is required to exercise in selling and supplying such a material to a purchasing consumer for the latter's use. Compliance with such Interstate Commerce Commission regulations would not absolve a manufacturer from liability for damage sustained by a consumer, if the manufacturer would be liable under the evidence and the instructions which I have heretofore given you.

"The fact, if it be a fact, that the plaintiff or his employees knew the physical characteristics or composition of the primer in question is alone insufficient to charge them with contributory negligence. In order for [307] plaintiff or his employees to have been contributorily negligent, you must further find by a preponderance of the evidence that they appreciated the peril or danger involved in heating the primer as they were doing, or, in the exercise of due care, acting as reasonably prudent persons, they should have appreciated it. In this connection, the acts of the plaintiff and his employees should not be judged by the knowledge of experts on the subject, but rather should be judged in the light of the knowledge and experience common to unskilled, ordinarily prudent individuals.

"Where the law imposes a duty on a manufacturer to warn those to whom he is selling the product of its dangerous nature, if any, the warning must be made in such a way as to acquaint a person of reasonable intelligence with the danger in-

volved, and an insufficient warning, is, in legal effect, no warning.

“In determining whether or not defendant was guilty of negligence or plaintiff or his employees were guilty of contributory negligence, you are instructed that foresight, not retrospect, is the standard of diligence. It is nearly always easy after an accident has happened to see how it could have been avoided, but negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men, under the same circumstances, would or should in the exercise of reasonable [308] care have anticipated.

“Now the fact, if it be a fact, that the manufacturer does not intend that his product shall be used in a certain way will not relieve him from liability for damages to one attempting to so use it, if the manufacturer, as an ordinarily prudent person, had reason to believe that it would be so used, and from the directions or instructions or information furnished by the manufacturer a person of ordinary intelligence would conclude that it might safely be so used.

“If you should find from the evidence that the roof primer when it was received by the plaintiff contained materials not called for by the defendant's formula which rendered the primer more flammable, explosive or dangerous, and the primer was in that respect defective, then the defendant would not be liable for injury and damage to property proximately resulting from such defective condition, unless it further appears by a fair preponder-

ance of the evidence that the defendant knew or, in the exercise of reasonable care, should have known of such defective condition; and in this connection you are instructed that it was the duty of the defendant to make only such inspection of the roof primer manufactured for it by its supplier as reasonable and ordinary care required, considering the nature and contents of the primer if made according to the formula and the uses for which it was sold and supplied. [309]

“There has been offered and received in evidence Defendant’s Exhibit No. 74, which is a general inventory and appraisal of the property of the Estate of H. N. Segerstrom, deceased. You will give the exhibit such weight and credit, considered in connection with all the other evidence in the case, as you feel that it is entitled to receive. In connection with the exhibit, however, you are instructed that the values placed upon property by estate appraisers, as shown on the exhibit, are not competent evidence of market value of the property in the present case and should not be so considered by you.

“Now the foreman and other employees of the plaintiff Segerstrom, when in the performance of their regularly assigned duties, were agents of the plaintiff in performing such acts, and any negligence of them or any of them was negligence of the plaintiff, and if such negligence was a contributing cause of damages to the plaintiff’s property, then the plaintiff cannot recover.

“In order for the plaintiff to recover against the

defendant, aside or apart from the Washington statute concerning which I have heretofore instructed you, he must show by a preponderance of the evidence that the defendant had knowledge of the danger, not merely a possible danger, but a probable danger that the material would be handled by the plaintiff in the way it was handled and that damage to [310] plaintiff's property would result, before the plaintiff is entitled to recover. If you find that the defendant could not reasonably anticipate such probable danger, then your verdict should be for the defendant.

“Where an article is not inherently dangerous, but becomes dangerous only because of some act of the plaintiff, then the defendant is not liable to the plaintiff for the consequences which might result therefrom, aside from the state statute concerning which I have heretofore instructed you.

“You are instructed that, generally speaking, all persons must exercise reasonable care for their own safety. Therefore, if you find from the evidence that there was a danger in placing the Battleship over an open flame in an enclosed room, and that plaintiff's employees in performance of their assigned duties appreciated or, in the exercise of reasonable care, should have appreciated such danger, then the defendant was not required to give warning of the danger.

“A manufacturer is not bound to anticipate that a product will be used other than in the manner intended, and if, considering the liability of defendant, aside from the Washington state statute pre-

viously mentioned, you find from the evidence that a reasonably prudent person would not under the circumstances place the material referred to in [311] the complaint on an open fire and within a room such as the room described by plaintiff's witnesses, then you should find for the defendant on the issue of such liability.

"If, on the issue of liability of the defendant, aside from the Washington state statute previously mentioned, you find from a preponderance of the evidence that the Battleship product sold to the plaintiff was a standard and common commodity and that there is no inherent danger in the product as manufactured which the defendant knew or ought to have known would probably produce the injury complained of and in the manner in which it was received, when handled by a person of ordinary knowledge and prudence, then your finding on that issue should be for the defendant.

"Now if, on the issue of liability of defendant, aside from the state statute previously mentioned, you find from the evidence that the Battleship primer became dangerous in this case only because of being heated in the manner in which it was heated, and that the plaintiff had been adequately warned against heating Battleship primer, then your finding on that issue should be for the defendant.

"You are instructed that it was the duty of the plaintiff, John Norman Segerstrom, to read the instruction book furnished him by the defendant and to follow the instructions as they would be

understood and construed by an ordinarily prudent person and to pass the information on to [312] the employees charged with using the Battleship product. If you find from the evidence that his failure to do so was a contributing cause of the fire and ensuing damage to his property, then your verdict should be for the defendant.

“Now, members of the jury, you are the sole judges of what is the evidence in this case and of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified in this trial.

“In weighing the testimony of a witness, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor, any party? Did he appear to be fair and candid, or otherwise? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

“Now a witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If the jurors believe that any [313] witness has

been thus impeached and discredited, it is their exclusive province to give the testimony of that witness such credit, if any, as they think it may deserve. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of a witness in the trial and in a deposition given before the trial, or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. You should bear in mind that two or more persons witnessing an incident or transaction may see it differently, and innocent misrecollection, like failure to recollect, is not an uncommon experience.

“In weighing the effect of any discrepancy, the jury should consider whether it pertains to a matter of importance or an important detail and whether the discrepancy results from innocent error or willful falsehood. You should be slow to conclude that any witness has willfully testified falsely as to any material matter; but if you do so conclude, you are at liberty to discredit the entire testimony of such witness, except insofar as it may be corroborated by other credible evidence in the case.

“An expert is an individual who, by education, study, training, experience, or observation or combination of these factors, has acquired special knowledge, skill or understanding in a particular subject beyond that of the average person. When witnesses qualify as experts in a [314] particular field and are allowed to express opinions rather than testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invad-

ing its functions. The responsibility to decide rests upon the jury. It is your duty to evaluate and appraise the testimony of a witness who expresses opinions precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. The rules for determining the credibility of witnesses which I have given you in these instructions apply to expert witnesses as well as to other witnesses.

* * * * *

(Instructions were given pertaining to measure of damages.) (T1672-1676)

"The fact that the Court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of this Court, either that it believes or does not believe, that the plaintiff is entitled to recover damages. Such instructions are given to guide you in the amount of your verdict, if you find that the plaintiff is entitled to recover damages against the defendant.

"Now from time to time, the attorney for one or the other of the parties has interposed objection to evidence. Counsel not only have the right, but the duty, to [315] make any and all objections which are deemed advisable or appropriate, and no inference or presumption should be indulged in one way or the other by reason of the making of such objections.

"At times throughout the trial, I have been called upon to pass on the question of whether certain offered evidence should be admitted. You are not

to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offer of evidence that was rejected, you should not consider the same, and as to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason for the objection.

“If I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or defendant in this case, you are instructed to entirely disregard the suggestion. I have tried to be strictly impartial, and if any action or expression of mine has seemed to indicate the contrary, you are instructed to disregard it. If I have made any comment on the evidence or regarding the facts in this case, either in these instructions or otherwise, in the course of the trial, you may consider, but you are not bound by such [316] comment. It is your duty to follow my instructions as to the law, but finding the facts, as I have told you, is your sole function and responsibility.

“Now in your deliberations, there is no room for sympathy, sentiment, prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, and to decide the issues upon the merits.

“Now when you retire to the jury room to con-

sider your verdict, you will take with you the exhibits which have been admitted in evidence in the case and a list of the exhibits which has been prepared by the Clerk for your convenience. I think you will find this list helpful, as there are 80 exhibits here. The list sets them out in chronological, numerical order, beginning with 1 and ending with 80. I think you will find it helpful if you wish to refer to a particular exhibit in your deliberations. And you will also take with you blank forms of verdict which have been prepared for your convenience, and the blanks are so simple I will not need to spend much time on them. They have what we call the heading of the case, and then one verdict: 'We, the jury in the above-entitled case, find for the plaintiff in the sum of \$.....;' the other form: 'We, the jury in the above-entitled case, find for the defendant.' You select the appropriate form, fill in the amount that [317] you find, if your verdict is for the plaintiff, and then have your foreman sign it and let the bailiff know that you are ready to return it into court.

"You will, of course, elect one of your members as foreman to begin with. The foreman, it will be his duty to preside over your deliberations on your verdict and to represent you as your spokesman in the further conduct of the case.

"Now it will be necessary for all of you to agree to return a verdict; in other words, your verdict must be unanimous. And when you have agreed upon a verdict unanimously and your foreman has

signed it, you will then be returned in the presence of the Court and the attorneys for the parties."

* * * * *

In the absence of the jury, plaintiff excepted to instructions. (T1680-1688)

Defendant's Exceptions (T1688-1698)

"Mr. Lowe: Fortunately, in most instances, the Court gave the instructions as they were requested so they are not too difficult to follow. I have had the unfortunate experience in the Federal Court of the Court giving instructions without even having them written out before, and they are difficult then.

"The Court: Yes, that makes it very difficult.

"Mr. Lowe: The defendant except to that portion of the instructions given as follows:

'You are instructed that, aside from any requirements of statutes, a manufacturer who puts up and sells a material which is inherently dangerous has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn;' for the reason that the material involved in this case, under the evidence, is not inherently dangerous, but becomes dangerous only when used in a way not intended by the manufacturer.

"The defendant further excepts to that portion of the instructions which are, in substance:

'You are therefore instructed that if you should

find from a preponderance of the evidence that the material sold by defendant to plaintiff was inherently dangerous, and that defendant failed to warn plaintiff of such danger as to the material, and the fire damage to plaintiff's property proximately resulted from such failure to warn, if any, then your verdict should be for [319] the plaintiff, unless you find further from the preponderance of the evidence that the plaintiff was guilty of contributory negligence.'

This exception is taken for the reason that it is the theory of the defendant, and the evidence establishes, that the material in question was not inherently dangerous and was dangerous only if improperly used or improperly treated.

"The defendant excepts to the instructions submitting to the jury the Revised Code of Washington 70.74.300, in which the jury is instructed:

'You are instructed that there is a statute of the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

"A person who puts up for sale or who delivers to a warehouseman, dock, depot or common carrier, a package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, power or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word 'explosive,' shall be guilty of a misdemeanor."

'You are instructed that a violation of the foregoing statute would constitute negligence.'

The defendant excepts to this instruction for the

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reason that the statute is intended to, and does, apply only to the items mentioned when they are in an unadulterated condition; for the further reason that the statute is no longer in effect; there is a later statute covering the handling of explosives [320] and defines explosives; and the substance here in question is not within the statutory definition of explosives contained—I have forgotten, we cited it to your Honor this morning or yesterday, I believe, the later explosive statute.

“The Court: The Laws of 1931?

“Mr. Graves: Chapter 111 of the Laws of 1931.

“Mr. Lowe: Yes, Chapter 111 of the Laws of 1931.

“The Court: I might say, to positively identify this instruction, it is one of the few that I gave without change, it is Plaintiff’s Requested Instruction No. 2.

“Mr. Lowe: Plaintiff’s No. 2, yes.

“We further except to the instruction given to the jury as to the application of the statute in question, namely, the Revised Code of Washington 70.74.300, reading:

‘If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to the plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by that statute;’ for the reason

that, as given above, this statute applies [321] only to the named articles when they are in their unadulterated condition; that the Laws of 1931 define explosives and govern the handling of the explosives, and this material does not come within either the definition nor does the statute here properly apply to the sale of roofing primer intended for application to an exterior surface of a building.

“The defendant excepts to that portion of the instructions in which the Court instructed the jury, in effect, that there has been some reference to the regulations of the Interstate Commerce Commission during the evidence and you are instructed that the regulations of the Interstate Commerce Commission as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such materials in closed containers; therefore, you should wholly disregard anything which you may have heard concerning the Interstate Commerce Commission regulations.

“This, of course, withdraws from the jury any consideration of those regulations, when, as a matter of fact, there is evidence that such regulations are recognized in the industry as being the measure of diligence or measure of care to be exercised by manufacturers in labeling their products, whether they are actually for use or transportation in interstate commerce or not, and there is evidence that they are the only known published regulations having to do with labeling of materials of the nature of this primer. [322]

“The Court: I didn’t give it in just the way that

it was proposed, but your statement sufficiently identifies it. It was Plaintiff's Requested Instruction No. 4.

"Mr. Lowe: Yes, I recognize there was some slight change in phraseology.

"The Court: Your reason, however, goes to the instruction that I gave.

"Mr. Lowe: Goes to the instruction as given, yes.

"The Court: Yes.

"Mr. Lowe: I believe that is all. I thank you.

"Mr. Graves: May I just make a further suggestion, Mr. Lowe?

"The Court: Yes, all right.

I suppose that your definite exception to Plaintiff's Proposed Instruction No. 2 would be sufficient to include it, but I presume you wish the record to show an exception to my having made an exception to those proposed instructions of those which I gave, I gave a number of those, where I made the exception that 'except for this statute?'

"Mr. Lowe: Mr. Graves just called my attention to that.

"Defendant further excepts to any reference in the instructions including in the definition of negligence or with reference to negligence the statutory prohibition contained in Remington's Revised Statute 70.74.300, and [323] excepts to the statutory reference in the instructions regarding negligence in sending out or selling or giving to the plaintiff material of an inherently dangerous character, for the reason that the evidence here establishes that

this material is not inherently dangerous, in any event, unless improperly used, and it is not inherently dangerous if used as expected to be used, namely, on the outdoor roof of a building.

“Mr. Graves: There is one point that I would like to discuss with your Honor briefly, and I have not been able to follow the instructions as carefully as I should like to.

“The gist of the instruction to which I wish to refer is to this general effect: the fact that the manufacturer does not intend to have his product used in a certain way is no defense if he should have anticipated that it would have been used in that manner. Now that is not an exact quotation, your Honor, but I think that is the gist of the instruction.

“The matter that I would like to point out there is this: There is evidence, and I think undoubtedly your Honor had in mind the heating of the primer over the fire.

“The Court: Yes.

“Mr. Graves: What I have in mind is that the instructions, or this instruction, is broad enough to permit the jury to draw the inference that—well, let me go back. [324]

“There are two elements that I think the plaintiff must prove: (1) that the primer, as they said in the pretrial conference, constituted a trap because it was so viscous that it could not be applied unless it was heated, and that from that we must have anticipated it would be heated. Now the fact is that there is evidence in the record which would

indicate that the primer is not viscous unless it is chilled, and the jury might very well draw the inference that this instruction applies to the purchaser placing the product in a cold storage warehouse and keeping it there until they were ready to apply it. In other words, the instruction is broad enough in its context to refer both to the chilling of the product by the purchaser, as well as to the subsequent heating of the product by the purchaser.

“Do I make myself clear to the Court in that respect?

“The Court: I am not sure that I follow you, no.

“Mr. Graves: Well, the instruction is the fact it is used in a certain way is no defense if the manufacturer should have anticipated that use. Now I apprehend that the jury may deem that the chilling of this product by placing it in cold storage is a use that the manufacturer did not apprehend and yet is excused by this instruction, and I don't think that was the intention of the Court. At least——

“The Court: No, I didn't have that in mind.

“Mr. Graves: It is my feeling that there were two uses here that the manufacturer could not anticipate: first, placing it in the cold storage and chilling it and then placing it over a fire to relieve that chill, and that the instruction intends to relate only to the subsequent improper usage.

“The Court: I think the one that you refer to is Plaintiff's No. 8, which I modified somewhat as I gave it. It is:

‘You are instructed that the fact, if it be a fact, that the manufacturer does not intend that his product shall be used in a certain way will not relieve him from liability for damages to one attempting to so use it if the manufacturer, as an ordinarily prudent person, had reason to believe that it would be so used, and from directions or instructions or information furnished by the manufacturer a person of ordinary intelligence would conclude that it might safely be so used.’

I know of no directions or instructions or information in evidence in this case that the product may be put in cold storage. There is evidence on the other points here, that is, from the standpoint of the plaintiff in their argument that this doesn’t apply to the primer, and so on. They [326] argue, of course, or contend that a person could conclude from the pamphlet furnished here that they can safely heat it. This qualifying language that I put in, I think, would keep the jury, if they follow the evidence, from concluding that that was intended to refer to putting it in cold storage.

“Mr. Graves: Well, I am not entirely clear, frankly. I would like to take an exception to that.

“The Court: Yes, all right, you may take an exception.

“Mr. Graves: That the instruction is broad enough to refer both to the placing of the primer in cold storage and retaining it in cold storage until the time that it was used, and, since it is subject to interpretation and the further interpretation that thereafter, to relieve the primer of the chill so con-

tracted, it would be proper to place it upon a fire, that is a use that no manufacturer could have anticipated and, therefore, should not have been given to the jury.

“I state that with some deference, your Honor, but it did seem to me it was broad enough to cover those two situations.

“The Court: All right. You may bring in the jury.

“I might say that one thing that might make counsel a little less concerned is the practice in Federal Court of not to send these typed instructions to the jury, so that it [327] is always problematical how many they really remember, anyway.

“Mr. Graves: I think we sometimes assume memory on the part of the jury that we may not be able to exercise ourselves.”

* * * * *

(The cause was submitted to the jury at 6:25 p.m., this date, May 7, 1954.) [328]

RULING ON MOTIONS

Be It Remembered That the above-entitled cause came on for hearing before the Honorable Sam M. Driver, Judge of the said Court, at Spokane, Washington, on May 28, 1954, on plaintiff's motion for a partial new trial and defendant's motion for judgment notwithstanding the verdict or for partial new trial; counsel being present as during the trial of the said cause, except that Ben H. Kizer appeared and made argument on behalf of defendant's motion.

(After hearing argument by counsel for the respective parties, the Court made the following oral rulings on the motions.) (T1701-1705)

“The Court: Well, if that is all the argument, I will try to briefly state my conclusions here, and I can do so by adopting, in part, the argument of counsel on both sides, as I need not repeat it or attempt to summarize it at length.

“I might say, however, that this case was one [329] which presented, to me, unusual difficulties. I think at one moment in the trial I remarked, in the absence of the jury, that the case simply bristled with difficulties.

“This statute gave me a great deal of trouble. I was first inclined to think that it didn’t apply, and it seemed to me a strange thing that we should have this statute that, while the evidence isn’t too clear about it, it seemed to me had been observed in the breach. For the most part, it obviously was not being enforced as to products similar to the ones involved in the suit.

“But, after exhaustive argument and mature consideration, I came to the conclusion that, under the evidence here, it was proper for me to submit it to the jury for the jury to determine whether or not the roof primer was a material substantially similar, substantially the same kind and equally as dangerous, as the naphtha or gasoline specifically mentioned in the statute; and I am in accord with Mr. Williams’ statement that there was evidence, at least, that this was a mechanical mixture, rather than a chemical compound, and that it was equally

or about as volatile and explosive and combustible as gasoline and more combustible and more dangerous than many grades of naphtha.

“And if I had it to do over again—of course, hindsight is always better than foresight or one’s judgment during the heat and rush of a jury trial—I would have [330] instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn’t do so because the question didn’t seem to be raised or the jury misled as to the application of the statute.

“It is a close question and one concerning which I still have doubts, but, having resolved it and submitted the case to the jury on the basis of it, I don’t think I should change my conclusion at this time regarding the applicability of the statute.

“Now on the question of the motion for partial new trial on the question of damages, the jury’s verdict was low, perhaps lower than I should have found if I had had the responsibility of finding the amount of damages, I don’t know. I prefer not to draw conclusions of that kind when I haven’t the responsibility. I do think that there isn’t anything here to indicate that the jury was influenced by

prejudice and passion, and there is nothing here, it seems to me, to show that the jury went beyond the undisputed evidence in finding the amount which they did in their verdict. [331] .

“While it is true that under the Federal practice, and apparently under the Washington State practice, as well, that in a proper case a new trial may be granted on separate issues, I have the feeling that that sort of relief should be sparingly granted, because you just can’t, it seems to me, in fairness, divide jury verdicts up into compartments and treat them like a problem in logic, because jurors are not required to be, and, as a rule, are not logical, and it seems to me that one who elects to have a jury trial should take the bitter with the sweet, the disadvantages as well as the advantages of a jury determination.

“And, while it may be, as Mr. Williams argued here, I am not inclined to dispute that, that there was a separate finding here, that the jury first found liability and then went on to the question of the amount of damages, it is awfully hard to segregate the influences of the two with a jury where the jury is called upon to pass on the two questions, and I have the definite impression, while I don’t say it as a matter of fact, I have the definite impression that, to say the least, it is extremely doubtful to me in my mind, that the plaintiff would have recovered at all in this case if it hadn’t been for the statute which was submitted to the jury. And it is pretty hard to say that some of these jurors, who would not have found for the plaintiff had

it not been for the statute, were not to some degree influenced as to the [332] amount as to the matter of damages.

“So that if you give a partial verdict, unless it is a clear-cut case, it seems to me it is somewhat unfair to the other party, and I am inclined to think if there should be a new trial, it should be a new trial on both the issue of liability and on the issue of damages, and neither side seems to favor that sort of treatment.

“Now that may be a rather practical way to look at things, but I have in mind that some of our eminent authorities on procedure, such as Professor Moore, who is the author of perhaps one of the best known works on Federal Procedure, in his defense of the jury system and general verdicts, says frankly that the jury verdict, particularly the general verdict, is the answer of the man in the street to judicial controversies; that you can't pin point it and say that it is an answer according to the law as embodied in the court's instructions and the facts as submitted; it is over-all rough justice, the answer of the man in the street, and, as Professor Moore says, ‘earthy justice’ that the jury dispenses.

“Now this is ‘earthy justice,’ and I just have the feeling that I wouldn't be justified in giving a partial retrial to either side here under the circumstances, so that I think the ruling of the Court will be that all of the motions will be denied.”

[Endorsed]: Filed September 8, 1954.

[Endorsed]: No. 14521. United States Court of Appeals for the Ninth Circuit. Panther Oil & Grease Manufacturing Company, a corporation, Appellant, vs. John Norman Segerstrom, as administrator of the Estate of H. N. Segerstrom, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: September 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14521

JOHN NORMAN SEGERSTROM, as Adminis-
trator of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff-Appellee.

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING COMPANY a Texas Corporation,
Defendant-Appellant.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

1. The testimony by Mr. McGivern, giving his opinion as to why manufacturer's labeled products, having a flash point of 150° or less is hearsay,

speculative, not a subject of expert testimony and not admissible.

2. The respondent was adequately warned that the product furnished him by the appellant should not be heated.

3. The proximate cause of plaintiff's damage was the unanticipated conduct of plaintiff in placing the product over an open flame.

4. The respondent, through his employees, was aware of the danger of heating the product and was, therefore, negligent as a matter of law and assumed the hazards in heating.

5. The construction and application of the Revised Code of Washington, Section 70.74.300 was for the Court to determine and should not have been left to the jury.

6. The Washington Statute RCW 70.74.300 does not intend to and does not apply to a commercial product such as the roof coating in question.

Dated this 14th day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ PAUL H. GRAVES,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed September 20, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION TO CONSIDER ORIGINAL
EXHIBITS

It is stipulated between the parties that the court may consider the original exhibits without the same being incorporated into the printed record, except insofar as excerpts are incorporated into the narrative statement of testimony.

Dated this 14th day of September, 1954.

GRAVES, KIZER & GRAVES,
/s/ PAUL H. GRAVES
PAINE, LOWE, COFFIN, ENNIS
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/s/ R. E. LOWE,
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Attorneys for Appellee

[Endorsed]: Filed September 20, 1954. Paul P. O'Brien, Clerk.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

PANTHER OIL & GREASE MAN-
UFACTURING COMPANY, a cor-
poration,

Appellant,

vs.

JOHN NORMAN SEGERSTROM, as
Administrator of the Estate of H.
N. Segerstrom,

Appellee.

NO. 14521

Appellant's Brief

*On Appeal from the District Court of the United
States, for the Eastern District of Washington*

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PAINE, LOWE, COFFIN,
ENNIS & HERMAN
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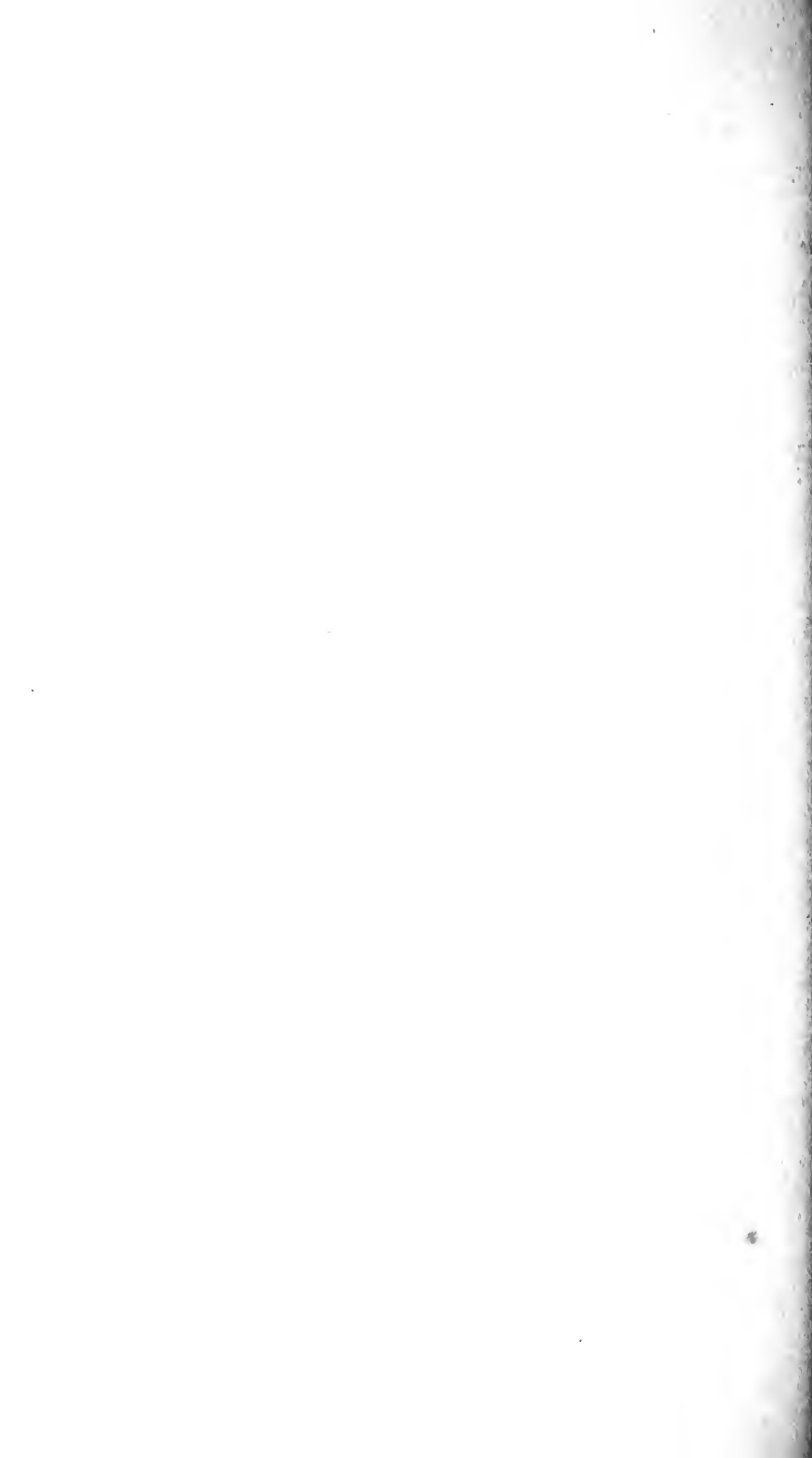
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FILED

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PAUL P. O'BRIEN,
CLERK



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JURISDICTION

The action was commenced in the Superior Court of Spokane County, Washington, on the 5th day of October 1953 by service of summons and complaint. (R. 3). On October 23, 1953, the defendant filed its Petition for Removal to the United States District Court for the Eastern District of Washington. (R. 3).

The plaintiff is and was a citizen and resident of Spokane County, Washington in the Eastern District, and the defendant is and was a corporate citizen of the State of Texas. (R. 4-5). This action was a civil action to recover damages for breach of express or implied warranty, for \$361,000.00. (R. 4). Petition and Bond were duly filed and notice served. (R. 6).

The case was tried to a jury with a verdict for \$111,035.00. (R. 34) and judgment entered thereon May 10, 1954. (R. 35).

On May 17, 1954 Motion for Judgment Notwithstanding Verdict, or for Partial New Trial was served and filed. (R. 36. The motions were denied June 14, 1954. (R. 40-41). On June 23, 1954 the defendant gave Notice of Appeal (R. 42) and duly filed a Cost and Supersedeas Bond. (R. 42-44).

On June 26, 1954 the time for filing the record in this court was extended to and including September 21, 1954. (R. 44-45).

The jurisdiction of the District Court is based upon Title 28, §§ 1441-1449 USCA.

The jurisdiction of this court is based upon Title 28 USCA, § 225, (§ 128 of Judicial Code) as amended.

ABSTRACT OF FACTS

PLEADINGS

The case was tried upon an Amended Complaint (R. 7-12) and Amended Answer to Amended Complaint. (R. 13-17). The plaintiff alleged that he purchased from defendant, through its agent, roofing materials, called "Battleship roof coating" and "Battleship roof primer" (R. 7-8). That the estate of which plaintiff was administrator owned a large concrete cold storage warehouse building and two adjacent frame warehouses, together with stock and equipment. (R. 8).

That on July 8, while plaintiff's employees were applying Battleship roof primer and were using due care, the roof primer violently exploded and ignited, setting fire to the buildings, and substantially destroyed the buildings and contents. (R. 9).

He alleged the explosion and fire were proximately caused by negligence and carelessness of the defendant, in that the Battleship roof primer was highly inflammable and explosive; that the defendant knew or should have known that fact and wholly failed, by labeling the containers or otherwise, to warn plaintiff and plaintiff's employees. (R. 9-10).

(At the pre-trial conference plaintiff withdrew all allegations and claims as to breach of warranty, express

or implied, and announced that he relied solely on claims of negligence.) (R. 21).

By its Amended Answer, defendant admitted the sale by its agent and denied the allegations as to representations or warranties by the agent. (R. 13). Defendant admitted that the plaintiff ordered Battleship roof coating and Battleship roof primer, admitted the sale, and denied all of the allegations of negligence. (R. 14-15).

Affirmatively, the defendant alleged:

First: Contributory negligence by the plaintiff and his agents. (R. 15).

Second: That plaintiff was furnished an instruction pamphlet but failed to follow the same or communicate the same to his employees. (R. 16).

Third: That the defendant's employees placed the Battleship primer in open containers, over an open fire, knowing that it was dangerous and there was danger of fire. (R. 16).

Fourth: That the merchandise was sold pursuant to a written order signed by the plaintiff and accepted by the defendant, which provided, in substance, that there were no conditions or agreements not shown in the original copy, and no statement or agreement should vary any part of the written agreement or be binding upon the company or buyer; that the buyers agree that the company has made no representations or warran-

ties express or implied not shown in the order. (R. 16-17).

A pre-trial order was entered (R. 17-22), as a part of which it was stipulated so far as material:

II. That Battleship primer is made according to specifications; that it is a uniform product as shipped by the defendant, and all barrels of Battleship received by the plaintiff were uniform as to contents when shipped. (R. 19).

The contentions of the parties were stated to be—

On behalf of the plaintiff, in substance:

I.

That the defendant knew or should have known that the Battleship primer was inherently dangerous and did not warn plaintiff in some way of its dangerous nature. (R. 20), and

II.

That the product could not be applied without heating, which the defendant knew or should have known, and the defendant knew or should have known that heating would render the material dangerous and subject to explosion or ignition of volatile gases while being heated. (R. 20-21), and

III.

That the sale of the product was in violation of the

Revised Code of Washington § 70.74.300, because the containers were not labeled "explosive" (R. 21).

IV.

The plaintiff withdrew all allegations, claims or contentions as to breach of warranty, express or implied, and relied solely upon negligence. (R. 21).

As a part of the pre-trial order, the defendant made the following contentions:

I.

That Battleship primer was not inherently dangerous and defendant neither knew or could have known it was such. It is not an explosive. (R. 21).

II.

Plaintiff signed an order blank which barred him from any reliance upon representations other than those contained in the order blank and instruction pamphlet. (Ex. 14) (R. 21), and

III.

Defendant gave plaintiff written instructions as to use and no fire would have occurred if they had been followed. (R. 21-22), and

IV.

The employees of the plaintiff exposed the primer to an open fire inside of a building, realizing that such action was dangerous, and the plaintiff assumed the risk. (R. 22).

EVIDENCE

There is no question on the amount of damages. All of that evidence is omitted from the record. The trial commenced on Monday, April 26th and continued through Saturday, May 8th.

The defendant manufactures, among other things, roofing materials which are sold under the general designation of Battleship products. (Ex. 14), and one of these products is roofing primer. (R. 59, Ex. 14), which is used on old roofs to furnish waterproofing. (R. 198-199). These products are made from asphalt, a petroleum residue (R. 272, 275) and the primer, sold by defendant in this case, was manufactured to its specifications by the Standard Oil Company of Indiana, at Casper, Wyoming, and is known as a cut back asphalt and for a cold application process. (R. 190, 191, 194, 199, 204, 238, 239, 269-273).

The Standard Oil Company distills crude oil and under a controlled heat process, remanufactures the lighter naphthas, which are pumped off to a storage area, and step by step, heavier kerosenes, lubricating oils and fuel oil until there is left in the last still, asphalt, a heavy viscous residue. (R. 238, 239, 243, 246, 270).

The particular product, that is, Battleship primer, is compounded as follows: (Known in the distillery as C K 87 R. 246).

The asphalt at a temperature of about 400 degrees is pumped into a blowing tank and air blown through it

at a pressure of 100 pounds (R. 240) and at a temperature of some 490 to 495 degrees fahrenheit. This changes the properties of the asphalt and this type is used only for cold roofing. (R. 240). It is then pumped into a mixing tank in which there has been placed a stated amount of heavier naphtha as a diluent. (F. 240, 241, 242). After a certain amount of mixing, samples are taken for testing and such a test requires about a day in the laboratory. If the sample is found to be up to specifications, materials are added, if that can be done, but if certain standards are found wanting, the whole tank full goes to the "slop tank" and is there worked over. (R. 242, 243). If any foreign substance is found in it the whole batch is slopped (R. 243). If the test meets specifications, the material is pumped directly into a transport truck and hauled to Denver. As each truck is loaded from the big mixing tank, a sample is taken and tests made. A copy of these tests with a bill of lading is sent by the driver, which are delivered to the Motor Royal Oil Company at Denver, which does the packaging of this product for the defendant. (R. 246, 266). The Motor Royal Oil Company at Denver uses no gasoline in its operations except a 55 gallon drum, kept on hand for motor fuel, and is kept under lock and key. (R. 272). Gasoline is never used as a diluent at the refinery, first, because it is not satisfactory, and, second, it is the most expensive product in a refinery. (R. 244, 246), in fact gasoline is a compound and as such is not produced directly in the refining process. (R. 243).

There is no physical or other connection between the

gasoline storage area and the asphalt plant at the refinery, and they are some two hundred yards apart. It is physically impossible for gasoline such as found in plaintiff's product to get into the roofing asphalt. (R. 243), and it would immediately show up in the test of the load. (R. 240-243).

This material is shipped from the refinery at a temperature of about 209 degrees and it loses 10 to 20 degrees in transportation. At the packaging plant it is pumped directly into another vat (R. 272), where it is heated and then placed, without any further treatment or change, in various casks, barrels and cans (R. 269) while at a temperature of about 219 degrees (R. 272). The particular order was contained in various carload shipments from the Denver plant to the Riverside warehouse (a public warehouse in Spokane). (R. 190, 192, 193, 194, 273, Ex. 50, 51, 52, 53, 54 and 56), and was delivered by auto freight carrier to the defendant. (R. 191, 204, 269 and 273). If any packages are damaged in transit between Denver and Spokane, the warehouse company returns them to the railroad and they are not put in stock. (R. 192).

One of the tests of the hazards of the use of a material is the flashpoint. This is determined by an apparatus and must be made exactly. (R. 258).

It is the temperature of the material itself when the fumes from the material will catch fire at a point one-eighth of an inch from the surface of the material when protected from draft by a protective hood. (R. 200-201). A small amount of material contained in an open

cup is heated in a hot water bath. (R. 201, 275, 276); a flame is moved mechanically exactly one-eighth of an inch above the surface of the material in one second of time and the temperature reached by the material when the flame ignites the rising fumes, is the flash-point. This is known as the tagliabue cup test, for convenience, tag cup, and specifications for the test are very rigid. (R. 114, 115, 200, 201, 275, 276, 258, 268). The room temperature has nothing to do with the test. This primer has a flash point of 80 or above.

The primer, in question, when used out of doors would not flash or catch fire unless an open flame were held an eighth of an inch above the surface in still atmosphere at the time it is being spread. (R. 200, 201, 224, 225).

Plaintiff's order was delivered to him by Riverside Warehouse Company to his plant, fifteen miles east of Spokane, about March first. (R. 67, Ex. 56); the foreman placed it in the cold storage warehouse, (R. 67) which is normally kept at a temperature of about freezing and under refrigeration. (R. 67), and is insulated with eight inches of insulation, walls, ceilings and doors. The refrigeration was turned off about that time but the room was kept closed. (R. 76).

There was mailed to plaintiff by the defendant an instruction pamphlet. (R. 58, Ex. 14), which he admitted receiving. (R. 58, 59). He observed it said: "Instructions for applying Battleship Asbestos Roof Coating" (R. 59).

(Pages two and three of this exhibit are reproduced as an appendix to this brief).

Mr. Rosenbaum, the foreman, examined the barrels of primer, knowing it was to be applied first, and found it quite thick. (R. 76). The next day he sat it out on the loading platform in the sun, where it could warm up. (R. 68). He also called plaintiff Segerstrom and asked if he had any instructions, that it was awfully thick. (R. 68), or asked for directions, according to Segerstrom. (R. 61). Mr. Rosenbaum told him there were no instructions. (R. 61, 77).

On Wednesday morning, Mr. Rosenbaum's crew attempted to draw the material out through the spigot and spread it, but it would not spread, although it ran much better than the day before. (R. 68, 69, 88).

The foreman and his men then made a crude stove from a 55 gallon drum. When completed it lay on its side inside of the building propped with bricks; it had a hole in each end (top and bottom of the drum), one to feed fuel, the other to let out smoke and draft. On the top there was an opening about 24 inches by 12 inches on which angle irons were laid. A fire was built in this stove of apple wood and after the fire had burned down to coals, two five gallon pails of the material were set on the angle irons over the fire to heat. (R. 70, 71, 72, 78, 88, 89).

An employee, Tom Woods, tested the material by sticking his finger into it and when he thought sufficiently thin and warm, carried it up to the roof where

the workmen applied it. (R. 89) and this procedure continued through the forenoon. (R. 89, 90).

During the noon hour someone built up the fire with applewood (R. 71, 93-94). Just after the noon hour, when the first pail had been taken to the roof, there was a sudden "whoosh" and the whole room seemed to catch fire. (R. 91). The entire building and contents was destroyed.

Tests of a similar fire of apple wood built in such a drum, indicates it would reach a temperature of 950 degrees in 20 minutes (R. 182, Ex. 49, 50), and after burning down to coals the temperature varied.

At the end of 135 minutes, the temperature of the front bucket was 295 degrees and the rear 285 degrees.

Mr. Erickson then added more applewood, as was done during the noon hour. In 10 minutes, he had a temperature of 480 degrees, 580 degrees, respectively. In 20 minutes, he had a temperature of 600 degrees and 750 degrees, respectively. The graphs on Exhibits 49 and 50, being Tests "A" and "B", respectively, show the extreme temperatures and the length they lasted. (R. 180, 181; Ex. 49, 50).

A viscous material, such as asphalt, does not circulate as water does when heated. The bottom becomes overheated, while the top remains comparatively cool. (R. 210-211). Even axle grease can be dangerous when so heated. (R. 223).

Rosenbaum, the foreman, and Woods, the workman who was handling the product, both knew the danger. Rosenbaum knew it was dangerous to put this material over a hot fire and he detected a petrolehm odor when it was opened. (R. 79-80); he knew petroleum was inflammable and dangerous to have around a fire. If he had been given an instruction book, he would not have heated the product. (R. 80-81). He told Woods to be careful "I presumed it might burn if it were spilled directly over the fire, (R. 72). Woods knew it might catch fire if it got too hot. (R. 94), and Rosenbaum told him to not let it get too hot. (R. 94).

After lunch the coals were hotter than they were before. (R. 93).

The defendant sold approximately 5½ million gallons of this primer. (R. 262, 263). No complaint of any fire or explosian had ever come to it. (R. 264, 265).

Mr. Urmacher, the Chief Chemist, with twenty-five years experience in the manufacture of petroleum products and roofing, had never heard of an explosion such as this. The product is intended for cold application on the outside of a building roof. (R. 199).

The barrel of primer remained on the loading dock outside of the warehouse after the fire. (R. 81), and about five days after the fire, at the instruction of plaintiff's attorneys, this cask was placed under a machine shed at Rosenbaum's house. (R. 75, 81, 82). Several people were there looking at it at different times, including insurance agents, but otherwise unidentified.

(R. 165). A sample was first taken from this barrel in November, 1953, by the plaintiff's chemist, Kniseley (R. 135) and samples were taken later by Mr. McGivern the following March. (R. 120). These samples were furnished to chemists for the defense. (R. 203). There is no material difference in their findings; they all agreed at that time the product contained about 7 or 8 per cent of gasoline. (R. 124, 137, 218).

It is stipulated that the primer was a uniform product when shipped by the defendant. (R. 19). The hazard of the material was in the gasoline content. (Kniseley R. 138). A material containing gasoline is as dangerous as gasoline. (McGivern R. 138). This sample is more dangerous than straight naphtha. (R. 142).

The chemical characteristic was plotted on a red curve on Ex. 27. This gasoline could not have gotten into the product at the refinery. (R. 246-247). The diluent used in compounding shows a different graph. (R. 247). Something had occurred after the product left the plant. (R. 232). Mr. Urmacher did not question Kniseley's results. (R. 229). Had the gasoline been in the product at any time before leaving the Motor Royal plant, it would have been detected (R. 228) and it would have been impossible to be mixed in the trucks or at the packaging plant. (R. 273).

The whole story of the hazard in these samples was the gasoline in it. (McGivern R. 124, Kniseley R. 141). Gasoline has a greater boosting power than dynamite. (R. 141).

SPECIFICATIONS OF ERROR

I.

The court erred in denying plaintiff's Motion for Dismissal and for directed verdict at the close of plaintiff's case. (R. 166-167).

II.

The court erred in denying defendant's Motion for directed verdict at the close of all the evidence. (R. 289-292).

III.

The court erred in instructing the jury:

"You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

'A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor.' "

"You are instructed that a violation of the foregoing statute would constitute negligence."

"If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you

that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute."

Exception was duly taken to this instruction (R. 316), the reason being given that it applies only to the items mentioned when they are in an unadulterated condition. Further, that the statute is no longer in effect, and, further, that the substance in question is not within the statutory definition of explosives contained in the statute. (R. 317); and that the statute would not properly apply to the sale of a roofing primer intended for application to an exterior surface of the building.

IV.

The court erred in denying the defendant's Motion for Judgment Notwithstanding the Verdict. (R. 36-41).

V.

The court erred in denying the defendant's alternative motion for a partial new trial on the issue of liability only. (R. 36, 41).

SYNOPSIS OF ARGUMENT

I.

There is no negligence on the part of the defendant, because it could not be reasonably anticipated that this roofing, intended for cold outside application, would ever be placed over a fire within a building, thereby generating explosive fumes. In many years' experience in the production and marketing of millions of gallons of primer such a thing had never happened.

II.

The proximate cause of the accident was the plaintiff's own independent negligence. First, in failing to furnish his employees the instruction pamphlet when the foreman requested instructions. Second, in the employees, not having been furnished instructions, placing the roofing primer over an open fire when they knew that was an hazardous act and they must be careful.

III.

That the lower court committed error in giving to the jury an instruction on the Washington statute requiring certain articles to be labeled "explosive," because, first, he should have construed the statute for the benefit of the jury, second, the statute on its face does not apply to such an article of roofing primer or other products having a thinner or vehicle subject to vaporization, and third, on its face applies to certain products in their original state, rather than a container holding a product with only a small percentage of the named article.

DEFENDANT'S NEGLIGENCE

SPECIFICATIONS OF ERROR I, II, IV.

The plaintiff's theory was, as we understand it and it was submitted to the jury, that the roofing primer was inherently dangerous since it would explode or its vapors would ignite when released under certain cir-

cumstances, namely, when the vapors congregate, as they did in this room, and a flame or spark were present.

Under all the evidence, roofing primer is designed to be used for a certain purpose. Millions of gallons have been used for that purpose and in a proper way without harm or disaster to the user. It is designed to be applied upon the exterior roofs of buildings to waterproof the felt.

There is no actionable negligence when the plaintiff, ignoring warnings and in disregard of the rules of common sense, makes an unexpected and improper use of a material. The basic rule is stated as follows:

“The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent to one in the position of the actor. The culpability of the actor’s conduct must be judged in the light of the possibility apparent to him at the time and not by looking backward ‘with the wisdom born of the event’. The standard must be one of conduct, rather than of consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred. The court must put itself in the actor’s place.”

Prosser on Torts, Page 220.

(We bear in mind in the instant case that the plaintiff abandoned all claims of breach of warranty, express or implied, and relied solely upon negligence.)

The plaintiff purchased a disinfectant. While pouring from the bottle into a can, some splashed in her

eye, and she was badly injured. The label said in part, "... made according to formula of the U. S. Government Hygienic Laboratory"; that, as a disinfectant, "it is safe and non-irritating and of pleasing odor..." Later on, the user was told to dilute it one gallon of pine oil to 60 gallons of water, to stir well after adding water. She testified that she had purchased it relying upon the statement that it was safe and non-irritating. The very fact that it was three times stronger than carbolic acid, as stated on the label, required that the safe and non-irritating statement be given this meaning—that it could not be construed to mean that if the undiluted disinfectant accidentally splashed into her eye, it would cause no irritation or harm to the eye. It was manufactured for and purchased by the plaintiff for the purpose of disinfecting her dog kennel. The manufacturer was held not liable as a matter of law.

Bender v. Wm. Cooper,
(Ill.) 55 N. E. 2d 94.

The defendant landlord furnished a restaurant owner rat poison. This was a phosphorous paste contained in tin cans. An employee of the restaurant owner, while attempting to light a gas burner, apparently held the match unintentionally close to one of the cans. An explosion occurred and she was injured. There was no warning on the can stating that it was explosive. The label read in part, "This phosphorous paste is guaranteed to rid any premises of rats or mice." As a matter of fact, it was explosive only under unusual circumstances, and there was, therefore, no duty upon the defendant to impart any notice or warning of danger

to the plaintiff. "Notice or warning of danger is not necessary where no danger is reasonably to be anticipated."

Larrimore v. Am. Natl. Ins. Co.,
(Okla.) 89 Pac. 2, 340 (345).

A manufacturer of fireworks was sued for the death of a youngster who placed a "spit-devil" in his mouth. The package contained no warning that the article was poisonous, notwithstanding the statute requiring such a label. As a matter of fact, the "spit-devil" contained phosphorous. It was shown that most fireworks of that character contain more or less phosphorous. They were intended to be lighted in connection with celebrations.

The court remarked that most fireworks are wrapped in red paper, but that should not make them attractive to eat. The court held that the manufacturer was not bound to foresee that some child might eat the article and therefore could not be held liable for such action on the part of the child.

Victory Sparkler and Specialty Co. v. Price,
(Miss.) 111 So. 437.

Where defendant sold Oil of Mirbane, he placed thereon a label stating the contents. It is a deadly poison but no poison warning was placed on it. Later the purchaser mistook the bottle for mouth gargle; and, in using it as a mouth gargle, he swallowed some and died. It was held there was no liability. The case is decided as partly on proximate cause. But the court said:

"We think, under the facts pleaded, that neither the death of Levin nor a serious injury to any per-

son could be reasonably apprehended or anticipated by the sale of a poisonous substance, labeled by its proper name, to one having full knowledge of its dangerous character.”

Lerin v. Muser,

(Neb.) 194 N. W. 672. (673).

It is a basic rule of reason that one is not liable for the result which he could not reasonably anticipate. Conditions can be imagined where a simple act results in injury to another where the injured does the unusual and unexpected. For instance, the City of Bellingham, Washington, was excavating for a sewer. In the middle of the afternoon, the crew quit work and placed lighted flare-pots, containing kerosene, to warn street users of the excavation. Some children climbed into the excavation, and one of them pulled a flare-pot over for the purpose of melting same tar. Kerosene poured from the pot onto the boy's clothing, and he was burned to death. An action for wrongful death was dismissed. While the case was decided upon negligence of the child itself and holding that the flame-pot was not an attractive nuisance, language used is in point:

“But whether the flame-pot was accident-proof or not is apart from the issue. No harm could have come to the deceased if he had not himself intermeddled with it.”

Clark v. Bremerton,

1 Wash. (2d) 689 (695) 97 P. (2d) 112.

So, in this case, had the defendant applied the cold roofing according to the instruction book and not intermeddled by attempting to heat it, as he was told not to do, no harm would have come to him.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS PLAINTIFF'S OWN INDEPENDENT NEGLIGENCE.

SPECIFICATIONS OF ERROR *I, II, IV.*

We must turn to an appraisal of what is the gist of plaintiff's case. This brings us squarely to a search for the proximate cause of the fire that destroyed plaintiff's warehouse.

Plaintiff's own case shows without dispute the successive steps that created this fire.

1. Plaintiff stored this primer for more than three months (from April 1 to July 8, 1953) in an insulated cold storage room, whereby the primer lost its normal fluidity (R. 68, 76, 77).

2. Plaintiff failed to inquire of defendant to ascertain how this fluidity could be restored or to read the "Battleship" circular given it which warned against heating the "Battleship" products of defendant, which included the primer he had, Ex. 14, and failed to inform the foreman.

3. Plaintiff's foreman, discovering the material was too thick to spread, called plaintiff and asked for instructions, and was told there was none.

In the words of Ray Rosenbaum:

"Then on Tuesday night, which I believe was the 7th, I called him up after I had examined the barrels, and was wondering about the procedure

of putting it on. I believe that was the day before the fire. At that time I told him we were ready to put this primer on and that I had examined it and it was awfully thick, and asked him if he had any instructions or if it took any particular know how to put it on."

(R. 68).

And confirmed by Segerstrom in this way:

"On July 6th he again called me and said he had labor available to apply the roofing and asked if it was all right to go ahead. At that time he asked me for directions as to how to apply the primer.

"I told Mr. Rosenbaum there were no instructions on applying the primer and to go ahead and put it on."

(R. 61).

Rosenbaum was then asked the question:

"And if you had known the instructions told you to leave it in a warm place for 72 hours, you would have done that, wouldn't you?"

Answer: "Well, I presume I would."

(R. 77).

And again with respect to putting it over an open fire:

"If I had been given an instruction book which said 'do not heat or thin Battleship', I wouldn't have done that, as I usually obey orders."

(R. 80,81).

4. Left to his own initiative, plaintiff's superintendent improvised a crude and dangerous device designed to apply excessive heat to the primer as a means of restoring the fluidity, the loss of which plaintiff had brought about by his own act of cold storage.

5. If so risky and primitive a fire box as this was to be used, common prudence would have maintained it outside the building, not inside where fumes would congregate.

Amplifying these facts, the nature of the risks taken in building a fire directly under pails containing this primer is shown by the crudity of the contrivance used.

Large holes were cut in either end of a 50-gallon drum—one to take the applewood in, the other to let the smoke out. Then two holes were cut in the top side of the drum so that two buckets containing the primer would sit down *in* the drum directly over the fire.

True, the witness says that he let the applewood burn until it “was more or less coals”; but, at the noon hour, more applewood was fed into the drum with the inevitable result that the flame must have flared up against the bottom of the buckets. As one of plaintiff’s chief expert witnesses, Kniseley said:

“There is an awful lot of careless operation of tar-pots.”
(R. 150).

Such “careless” operation is, of course, intrinsic in a contrivance so primitive where there is no control whatever nor any way of measuring or regulating the amount of heat generated by the burning of applewood immediately under the buckets.

Furthermore, it is clear that plaintiff’s employees on the job realized that they were taking risks in heating this primer directly over the fire. Rhea Rosenbaum, the

superintendent in charge, testified on his direct examination on behalf of plaintiff:

“I told Mr. Woods to be a little bit careful and not spill a bucket, something to that effect, in handling the material while being heated on the stove, for the reason I presumed *it might burn* if it were spilled directly on the fire. I didn’t know to what extent it might burn but I didn’t figure it would amount to too much.” (Emphasis supplied.) (R. 72).

Tom Woods, who looked after the fire built directly under this primer, testified to the warning given him by the plaintiff’s superintendent, as follows:

“Mr. Rosenbaum had told me to be careful and not let it get too hot.”
(R. 24).

And, on cross-examination, Rosenbaum further testified:

“If I had been given an instruction book which said, ‘Do not heat or thin Battleship’, I wouldn’t have done that, as I usually obey orders.”
(R. 80, 81).

This makes it clear that if the plaintiff had given his superintendent in charge the pamphlet which defendant had mailed to plaintiff, with the intent to warn him against heating it, the superintendent would not have disregarded the warning in the pamphlet, and the accident would never have occurred.

True, as plaintiff so vehemently and often insisted at the trial, the primer could be *applied* by unskilled labor. But, to say this is far from telling plaintiff that he can deprive the primer of its fluidity and then re-

store it by means of his own devising, in disregard of any inquiry or instruction.

So to bring together the facts out of plaintiff's own case is to establish the proximate cause of the fire. There is an excellent statement of the rule in 2 "Restatement of Torts," p. 1186, Sec. 441 (2b) which distinguishes between remote and proximate cause. It chiefly deals with the intervention of a third person but the rule so stated is equally applicable when the intervening force is set in motion by the plaintiff himself, or some agent of his.

"The cases in which the effect of the operation of an intervening force may be important in determining whether the negligence actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation *harmless until something further occurs*, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence while the third person's negligence which sets the intervening force in active operation, is called active negligence." (Emphasis supplied.)

Where the delivery by the railroad of a container of inflammable spirits in a broken condition resulted in a heavy loss by fire of the contents of the entire carload, the Supreme Court of the State of Washington applied the above rule as follows:

"Undoubtedly the carriage of the spirits from Minneapolis to its destination at Portland with one of its containers in a broken condition was an event in the sequence of events that led up to the loss of

the property, but it was no more the proximate cause of the loss than was . . . any other act committed in reference to the property prior to its loss.”

Rothchild Bros. v. N. P. Ry. Co.,
68 Wash. 527, 532; 123 Pac. 1011.

A railroad violated a city ordinance by allowing its engine to stand in the street in excess of the time permitted by ordinance. The plaintiff walked out into the street around the front of the engine, after the ordinance had thus been violated, and was struck by a motor car, suffering serious injuries. Holding that the railroad company's negligence was not the proximate cause of the injuries sustained by plaintiff, the Supreme Court of Washington said:

“Respondent's act of which appellant complains did no more than supply a condition by which the injury was made possible.”

Smith v. G. N. R. Co.,
14 Wash. 2d, 245; 127 P. 2d, 712.

See also to same effect:

United States v. Rothschild I. S. Co.,
183 F. 2d, 181 (Ninth Circuit).

Stephens v. Mutual Lumber Co.,
103 Wash. 1; 173 P. 1031.

Berry v. Farmers Exchg.,
156 W. 65, 17; 286 P. 46.

Johanson v. King Co.,
7 W. 2d, 111; 109 P. 2d, 307.

Cook v. Seidenverg,
36 W. 2d, 256; 217 P. 2d, 799.

We turn to a few illustrative cases from other states closely related to the case at bar, and in harmony with Washington decisions.

The act of a passenger who had boarded the wrong train through the actionable negligence of the carrier, in alighting while the train was in motion, without being advised to do so, was the act of a responsible agent intervening between the negligence of the carrier and the injuries sustained while alighting, which precluded the recovery thereupon. The court said:

“The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. In other words, the law always refers an injury to the proximate, not to the remote, cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and will refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture where the uncertainty renders the attempt at exact conclusions futile.”

Chesapeake & Ohio R. Co. v. Wills,
(Va.) 68 S. E. 395, 397.

In violation of statute, a steamer discharged a considerable quantity of fuel oil from its hold into the waters of the bay, and it flooded under the wharf and around the opposite side. By some independent means, a fire was started on the wharf which damages a vessel lying on the opposite side from the steamer, the in-

jury being increased by the burning oil which flooded around her sides and which caught fire from the burning wharf. It was held that the act of the steamer in discharging the oil into the bay was not the proximate cause of the injury but only created a condition which made the subsequent fire, which was the proximate cause, more disastrous and that she was not liable for such injury, or any part of it. This is a well-considered case and has numerous quotations from texts and other cases supporting its decision on the question of proximate cause.

The Santa Rita,
173 F. 413.

Plaintiff claimed injury from kerosene that did not comply with the requirements of the statute. Just how the accident happened was in doubt, but the court held that if the kerosene was poured on the live coals in the kitchen, the plaintiff could not recover. The court said:

“The jury were also instructed that, if the oil exploded while the decedent was pouring it on the fire it was for them to say if such conduct was careless. As a matter of general understanding, there is danger of explosion in doing such a thing, and ordinary prudence does not countenance it. It is below the standard of care the average man takes, and can not fairly be called the exercise of due care. If the decedent was burned by an explosion under such conditions everyone in the exercise of fair judgment would call her in fault. The evidence of an expert that such an act might be done without producing an explosion does not tend to disprove the common knowledge that *it is not an act of safety.*” (Emphasis supplied.)

Olena v. Standard Oil Company,
(N. H.) 135 Atlantic 27, 30.

In the instant case, it certainly was not an act of safety to take the chances that plaintiff did in heating up the primer within the confines of the building with the crude device used.

Applying these principles to the facts of this case, we enter into a field of uncertain conjecture when we go beyond the immediate facts of the plaintiff's own obvious carelessness to seek for a remoter cause of the fire. Was plaintiff warranted in putting aside the information given him in the "Battleship" circular? When plaintiff learned that the primer lacked its normal fluidity, from his own act or otherwise, was he in the exercise of due care when he failed to inquire or to inform himself as to a safe, certain method of restoring that fluidity? It is such conjectures as these that plaintiff invites when he asks the court to go beyond his immediate independent and manifest negligence to seek for a remoter cause of this fire.

As a corollary in this, the actual cause of the explosion and fire is in great doubt. By that we mean this;—plaintiff's witnesses based their theory entirely upon the basis that the samples which they took, commencing two months after the fire, from a drum which had been left standing unguarded and unprotected all that time, contained gasoline. "The gasoline was the whole story of the hazard." (McGivern R. 124). "The cause of the fire was the gasoline fumes." (Kniseley R. 141).

Yet there was no physical possibility of gasoline being in the primer when it was delivered to Segerstrom. The refinery has a better use for motor fuel which is

kept in an entirely separate part of a large plant one and one-half miles long. It is not a satisfactory cut-back in any event, and they use a solvent more suitable. After being given a complete test in the mixing still, it is pumped directly into a tank wagon, carried to the packaging plant at a temperature which admittedly would distill off any gasoline. It is then reheated, placed in packages, and remains in the custody of a common carrier or public warehouse until received by the defendant.

The barrels were then put into a refrigerated and insulated warehouse. (It is true that Mr. Rosenbaum says that he thinks that the refrigeration was turned off about that time.) Naturally, it was found difficult to pour when they attempted to use it in July and asked Segerstrom for instructions.

The casks from which the samples were taken remained on the loading platform during a terrific fire which destroyed a large warehouse. Gallons of water were poured upon it undoubtedly. What persons had access to it from that time on, we do not know. It was finally removed to an open shed a short distance away. Innumerable people were there looking at the barrel. Many possibilities occur to one, but, in the words of Mr. Urmacher, the chemist under whose control this product is manufactured, "Something happened to it after it left our plant." (R. 232).

These facts make all the more important the question of proximate cause which we have just discussed. It is possible, as a matter of fact, that the naphtha nor-

mally used in making this cut-back would have created a somewhat similar situation within the warehouse, as described by the witnesses as having been created by gasoline. However, their opinions were based on gasoline which could not possibly have been in the product before delivery to the plaintiff. The whole trouble was building a fire under a mixture of this sort. In fact, the plaintiff's own expert, Kniseley, put his finger on the matter when he said, "I found fault with the attempt to heat the primer by the workmen, but not with the procedure followed." (R. 149).

THE DEFENDANT'S PRIMER IS NOT WITHIN THE EXPLOSIVE STATUTE OF THE STATE.

SECTION 70.74.300 R.C.W.

Specifications of Error III, V.

The trial court laid in the lap of the jury a section of the Washington criminal code in these words:

"You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

'A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word 'Explosive' shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you find from a preponderance of the evi-

dence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute.”

To submit this statute to the uninstructed interpretation of the jury, without chart or guide, was error for several reasons: First, because the interpretation of the statute is for the court as a question of law, not for the jury;

Second, because this is a criminal statute, to be strictly construed, not to be extended beyond its plain terms;

Third, because under the rule of *ejusdem generis* a roof or paint primer or coating is manifestly not within the terms of this statute;

Fourth, because the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings.

We treat of these four propositions in their order:

First: *Statutory Interpretation for the Court*: This instruction turned the jury loose to interpret the meaning of the foregoing statute as it might see fit. For example, without judicial interpretation the jury was at liberty to give to the words “combustible substance” the ordinary and dictionary meaning of any substance that will burn. Such a submission of the statute without

judicial guidance was in effect to tell the jury to find that the defendant had disregarded the statute and was therefore liable to the plaintiff.

But it is hornbook law that it is for the court, not for the jury, to interpret the meaning of statutes. In *Northern Pacific R. R. Co. v. Finch*, 225 Fed. 676 Judge Amidon succinctly expressed the vice of submitting a statute in the raw to a jury for it to place its own interpretation upon it, in these words:

“It is for the court to say what Congress meant by this (statutory) language. That question cannot be properly left to the jury. Otherwise there would be as many rules as there are verdicts.”

To same effect see:

Hill v. R. R. Co.,
(Minn.) 200 N. W. 485, 487.

Boston v. Boston el R. R. Co.,
(Mass.) 100 N. E. 601.

The Supreme Court of the State of Washington in *Hastings v. Department of Labor and Industries*, 24 Wash. 2d. 1, 12-13, 163 P. 2d. 142, reached a like conclusion, saying:

“The question with which we are here immediately concerned is not so much *how* the act shall be construed, but, rather, *by whom* it is construed.

“The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of the government, and it is the court’s province, as well as its duty, to construe laws enacted by the legislature, 50 Am. Jur. 198, Statutes, Sec. 219.

“By Rem. Rev. Stat., Sec. 89 (P. P. C. Sec. 72-1), a jury is defined as:

‘A body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power . . . to try a question of fact.’

“Expressed with relation to each other, the province of the court—the trial judge—is to determine and decide questions of law presented at the trial and to state the law to the jury, while the province of the jury is to determine the facts of the case from the evidence adduced, in accordance with the instructions given by the court. 53 Am. Jur. 141, Trial Sec. 156.”

Second: *Rule of Strict Construction*: This statute was enacted as a part of the criminal code of the state, being Section 254 of the Session Laws of 1909, Chapter 249. As a penal statute it should be given a strict construction and not extended beyond its plain terms and intent. This basic rule needs no elaboration, but two characteristic utterances of our Supreme Court are directly applicable. In *State v. Eberhart*, 106 Wash. 222-225, 179 P. 853 in construing a penal statute our Supreme Court said:

“The rule for the construction of penal statutes is, that they are to reach no further than their words and a person is not to be made subject to them by implication.”

And in *Huntworth v. Tanner*, 87 Wash. 670, 682, 152 P. 523 our Supreme Court said:

“The law is penal. It is well settled that if it is doubtful whether a given act falls within or without a penal statute, the doubt will be resolved in favor of the innocence of the one charged or who may be charged, with its violation.

‘Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence.’ *State v. Anderson*, 61 Wash. 674, 112 Pac. 931.”

Third: *Ejusdem Generis*: An examination of the statute discloses how narrow are its specific terms. Of the four main products of petroleum it mentions three but omits the fourth, kerosene, which was equally as “combustible” as the three mentioned to-wit: benzine, gasoline and naphtha. Yet it will be remembered that in 1909 kerosene was the major product of petroleum.

In the article on petroleum in the 2nd Edition of Volume 18 of the New International Encyc. p. 440 (published in 1916) the text in referring to the distillation of petroleum in the year 1913 said:

“In the distillation of 100 gallons of crude petroleum there are obtained on the average about 76 gallons of illuminating oil (kerosene) 11 gallons of gasoline, benzine and naphtha and three gallons of lubricating oil while the residuum and loss amount to ten gallons.”

This clearly indicates how large was the consumption of kerosene proportionately and how tiny the use of gasoline as late as 1913.

Conversely in the article on petroleum in 15 Collier’s Encyc., p. 618 we are told that in 1947 nearly 800,000,000 barrels of gasoline were consumed in internal combustion engines in the United States while only 104,000,000 barrels of kerosene were used, a striking reversal in consumption.

In 1908, the last full year before the adoption of the statute in question at the January-March session of the 1909 legislature which passed this law, the public records in the office of the Department of Licenses of the State of Washington discloses that there were only 1955 motor vehicles of all descriptions in the entire state of Washington and the same record discloses that the first motor car had been licensed for use in this state in 1906, only two years earlier. The same record discloses that in 1953 there were over 1,100,000 such vehicles licensed in this state.

In Volume 17 *Encyc. Brit.* (1954) at page 662 the text of its article on petroleum is:

“Kerosene was the industry’s principal product until the early 20th century, when the kerosene age gave way to the gasoline age. Up to this time gasoline had been virtually a waste product, a nuisance to refiners . . . the easiest way to dispose of gasoline was to let it run away down the creeks.”

In other words, the use of petroleum products, except for kerosene, was only in its infancy in 1909. Their nature was not well understood, the volume of use of them was tiny and it seemed appropriate to the legislature to deal cavalierly with benzine, gasoline and naphtha. No wonder the trial judge spoke of this statute as obsolete. (R. 293). The reasons why it is obsolete are to be found in the sudden and astounding spread of the use of these petroleum products to the point that every adult is as familiar with the uses of petroleum products as he is of wood, also a combustible.

Now, this sleeping statute is suddenly awakened by ingenious counsel for plaintiff and sought to be used, not against the products named in the statute, but against a highly reputable, well understood commercial product, merely because appellees have employed a chemist who, by distillation and redistillation of this primer, has finally been able to extract from it a minor percentage of gasoline, just as he would have been able to do if he had distilled any of the many hundreds of other commercial products which modern chemists miraculously and bounteously produce out of hydro-carbons.

This statute is so primitive that it assumes that gasoline would continue to be sold in the familiar five-gallon cans in grocery stores. There was no prevision of the ubiquitous gas stations that now so prominently and numerous dot the landscape in all directions and which have completely done away with the gasoline can in marketing, thus abolishing the statute as effectively as to gasoline as if the legislature had repealed it.

The much greater predominance in 1909 of kerosene over gasoline, benzine and naphtha forbids the surmise that kerosene was overlooked by the legislature. On the contrary its omission clearly indicates how narrow was the expected scope of the statute and calls especially for the application of the familiar rule of *ejusdem generis*, in considering the meaning of the statutory words "or other explosives or combustible substance." If we do not apply the rule of *ejusdem generis* to the word "combustible" it leads to absurdity.

In Websters New International Dictionary the word "combustible" is defined as "capable of undergoing combustion; apt to catch fire; inflammable." Thus any substance made of the carbons or hydrocarbons, such as wood, coal, cotton or vegetable fiber and all of the new plastics, to name but a few, are combustible. To suppose that the legislature intended any and all articles thus derived to be labeled "explosive" would give us a preposterous result.

The rule of *ejusdem generis* is so widely applied and so well understood that we confine our citations to but a few of the cases deemed in point.

In *State v. Hemrich*, 93 Wash. 439, 447, 161 P. 79, the Supreme Court of Washington refused to follow the case of *People v. Strickler*, 25 California Appeal 60, 142 p. 1121 saying of it:

"The decision is obviously unsound. It reverses the rule of *ejusdem generis* in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse.

'In statutory construction, the '*ejusdem generis* rule' is that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.' "

In *State v. Eberhart*, 106 Wash. 222, 224-5, 179 P. 853, defendant was prosecuted for larceny of property owned by a partnership in which he was a partner. The

prosecutor claimed that the general clause in the statute, "or a person authorized by agreement," which followed the specific classes mentioned was broad enough to include the acts for which defendant was prosecuted.

Denying the contention of the state the court said:

"This is a general clause following the specific mention of a number of enumerated subjects. In such a case, the rule is that the enumeration of a special class of subjects, being followed by a general clause intended to embrace subjects not enumerated, the general clause will be construed to include only subjects that partake of the same nature as those already mentioned (citing cases).

The last sentence of the above strongly denies the application of this "explosive" statute to such a subject as paint or roof primer.

In the late case of *State v. Thompson*, 38 Wash. 2d. 774, 777, 232 P. 2d. 87 in restricting the effect of a statute defining the crime of second degree burglary our Supreme Court gave yet another expression to the principle of *ejusdem generis* in the following words:

"The *ejusdem generis* principle of statutory interpretation is well known and citation of available and extensive authority is not indicated. The principle requires that general terms appearing in a statute in connection with precise, specific terms, shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence or collocation in legislative enactments."

To same effect see:

Farwell v. Seattle,
43 Wash. 141, 146, 86 P. 217.

State ex rel Gilroy v. Superior Court,
37 Wash. 2d. 926, 932, 226 P. 2d. 882.

Inasmuch as the adoption of the rule of *ejusdem generis* by the Supreme Court of this state is based on the decisions of the courts of other states and is in accord with the general rule widely recognized by our courts, the following cases have been selected out of many more because of their special pertinence.

See:

Smith v. State,
(Okla.) 151 P. 2d 74, 85.

McGee v. Bennett,
(Ga.) 33 S. E. 2d. 577.

Zinn v. City,
(Mo.) 173 S. W. 2d. 398.

Fourth: *Executive Construction*: Volume 7 of the Annotations to R. C. W. and Shepard's Citations alike disclose that the above statute has never been referred to in any way by our Supreme Court, and the records of the office of the Attorney General of the state show that the Attorney General has never been called on to construe or give an opinion concerning the statute.

With reference to this court's taking judicial notice of the official records in the Attorney General's office, we rely on:

Chicago-M. and St. Paul R. R. Co. v. Hedges,
5 F. Supp. 752, 755.

Savannah River Elec. Co. v. F. P. C.,
164 F. 2d. 408.

Hernandez v. Frohmiller,
(Ariz.) 204 P. 2d. 854.

Furthermore the industry of appellee's counsel was unable to discover a single can of roof coating, primer, paint or similar product that had ever been labeled in compliance with this statute. The most they were able to show was that certain competitive roof coating stamped their cans with "Do not heat" which manifestly does not make any effort to comply with the statute.

When counsel for appellant expressed their surprise and dismay at the giving of such an instruction the trial judge, in ruling thereon said:

" * * * it seems peculiar to me that the statute hasn't been enforced, that it should be applicable in a case of this kind, but, of course, it is neither my duty or my function or in my power to try to wipe from the statute books of the State what I regard as perhaps *obsolete* statutes that should be repealed." (R. 293). (Emphasis supplied).

The importance of the error in giving this instruction is disclosed by another comment made by the learned trial judge in ruling on the motion for a new trial where he said:

"I have the definite impression that, to say the least, it is extremely doubtful to me in my mind, that the plaintiff would have recovered at all in this case if it hadn't been for the statute which was submitted to the jury." (R. 326).

Fourth: The above history of this statute indicating that neither the office of the Attorney General nor any of the 39 County Prosecutors, charged with the enforcement of the statute, over a period of 45 years, have ever considered that this statute went beyond its plain terms to cover such commercial products as roof or paint primers or coatings, gives rise to the application of another generally recognized legal principle of respect by the courts for executive construction. That rule was adopted early in the history of the decisions of our Supreme Court. In *Regan v. School District No. 25*, 44 Wash. 523, 525, 87 P. 828, the Supreme Court of Washington said:

“While the construction placed upon a statute by a department of the government having to do with the subject-matter thereof is not conclusive upon the court, yet such interpretation (and especially when long observed) will not be ignored or lightly regarded.” (Citing cases).

The ruling there laid down has been reaffirmed by our Supreme Court in a number of cases:

Spokane & Eastern Trust Co. v. Young,
19 Wash. 122, 124, 52 P. 1010.

State ex rel Shively,
63 Wash. 103, 107, 114 P. 901.

State ex rel Ball v. Rathbun,
144, Wash. 56, 59, 256 P. 330.

State ex rel Taylor v. Superior Court,
2 Wash. 2d. 575, 586 P. 2d. 585.

Smith v. Northern Pacific R. Co.,
7 Wash. 2d. 652, 664, 110 P. 2d. 851.

In view of the fact that this rule has been taken from the decisions of many other states as indicated in the Regan case and in view of its special importance here we venture to extend this text by quotation from decisions of other states and the Federal courts.

In *United States v. Cooper Corp.*, 312 U. S. 600, 613 where there was a suit to recover triple damages by the United States under a statute awarding triple damages to any "person" damaged, the fact that no suit had ever been brought by the United States in the 50 years of the life of the statute was held significant in demonstrating that "person" did not include the United States.

In *Kithcart v. Metropolitan Life Insurance Company*, 55 Fed. Supp. 200 (certiorari denied 326 U. S. 777).

"The concurrence of the bar in any interpretation of the Constitution and laws for a long period of time is the strongest sort of argument that such interpretation is right."

(Quoted approvingly in *Jackson v. Missouri R. Co.* in 211 S. W. 2d. 931-937. (Mo.).

In *Westerman v. Supreme Lodge the Knights of Pythias*, 94 S. W. (Mo.) 470, the Supreme Court of Missouri quoted approvingly from Endlich on the Interpretation of Statutes, Sec. 83 as follows:

"A statute applicable to a large trade or business should, if possible, be construed, not according to the strictest or nicest interpretation of the language but according to a reasonable and busi-

ness interpretation of it, with regard to the trade or business with which it is dealing.”

See also:

Matthews v. Matthews,
(Okla.) 96 P. 2d. 1054, 139, ALR 202, 204.

State v. Iowa Agric. Assn.,
(Iowa), 48 N. W. 2d. 281.

State v. Coloff,
(Mont.) 231 P. 2d. 345.

Denver v. School District,
(Col.) 30 P. 2d. 866.

State ex rel Butz v. Marian Circuit Court,
(Ind.) 72 N. E. 2d. 225, 170 ALR 187, 196.

State v. Nashville Baseball Assn.,
(Tenn.) 211 S. W. 357.

Summarizing; over the vigorous protests of defendant's counsel (R. 293-296) the trial judge submitted to the jury, for its own interpretation, without explanation or definition of any kind, an obsolete criminal statute, respecting the petroleum products of benzine, gasoline and naphtha or other “combustible substance,” and gave to the jury *carte blanche* to enforce that statute against the widely used commercial roof primer of appellant, in spite of the fact that the State of Washington in more than 45 years had never once given any such interpretation to this statute. A more flagrant violation of the rights of this defendant can hardly be imagined.

CONCLUSION

Clearly the plaintiff made no case as against the defendant under the circumstances related, because, (1) there was no primary negligence, or (2) if there were primary negligence the proximate cause of plaintiff's damages were his own gross carelessness in failing to advise his men, and in their, without guidance or direction, engaging in a cooking operation which they knew would be dangerous.

If the court can not agree with us in these, then the very prejudicial error in permitting the jury to classify this roof primer, along with gasoline, benzine, naphthas and dynamite, entitles the defendant to a new trial on the question of liability. There is no cross appeal.

Respectfully submitted,

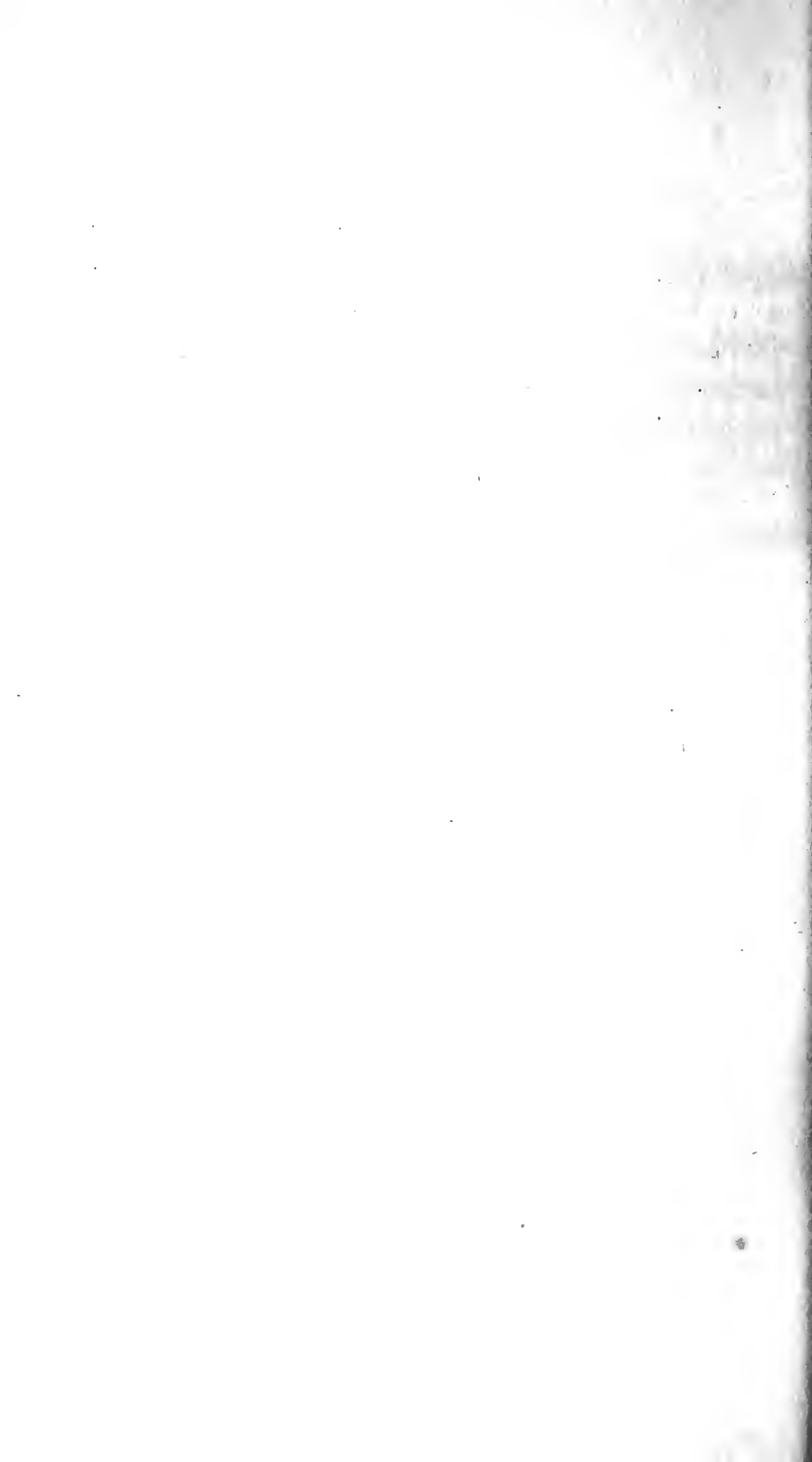
R. E. LOWE

BEN H. KIZER,

Attorneys for Appellant.

GRAVES, KIZER & GRAVES

PAINE, LOWE, COFFIN, ENNIS & HERMAN



CAREFULLY
follow these
instructions
for applying
BATTLESHIP



*...and
LONG-LASTING
WATERPROOF PROTECTION
is yours!*

Special Notice

BATTLESHIP LIQUID ASBESTOS ROOF COATING IS NOT RECOMMENDED FOR USE ON WOOD SHINGLES OR SLATE ROOFS.

Page Two

*Please...
READ THIS PAGE
before starting
application!*

DO NOT HEAT OR THIN BATTLESHIP

Do not heat BATTLESHIP with an open flame. Do not thin it. When either is done, the waterproofing qualities of BATTLESHIP are damaged. Hence, a proper job is impossible. If, in extremely cold weather, it is necessary to heat BATTLESHIP, do so by placing the drum in a warm room 72 hours before the material is to be used.

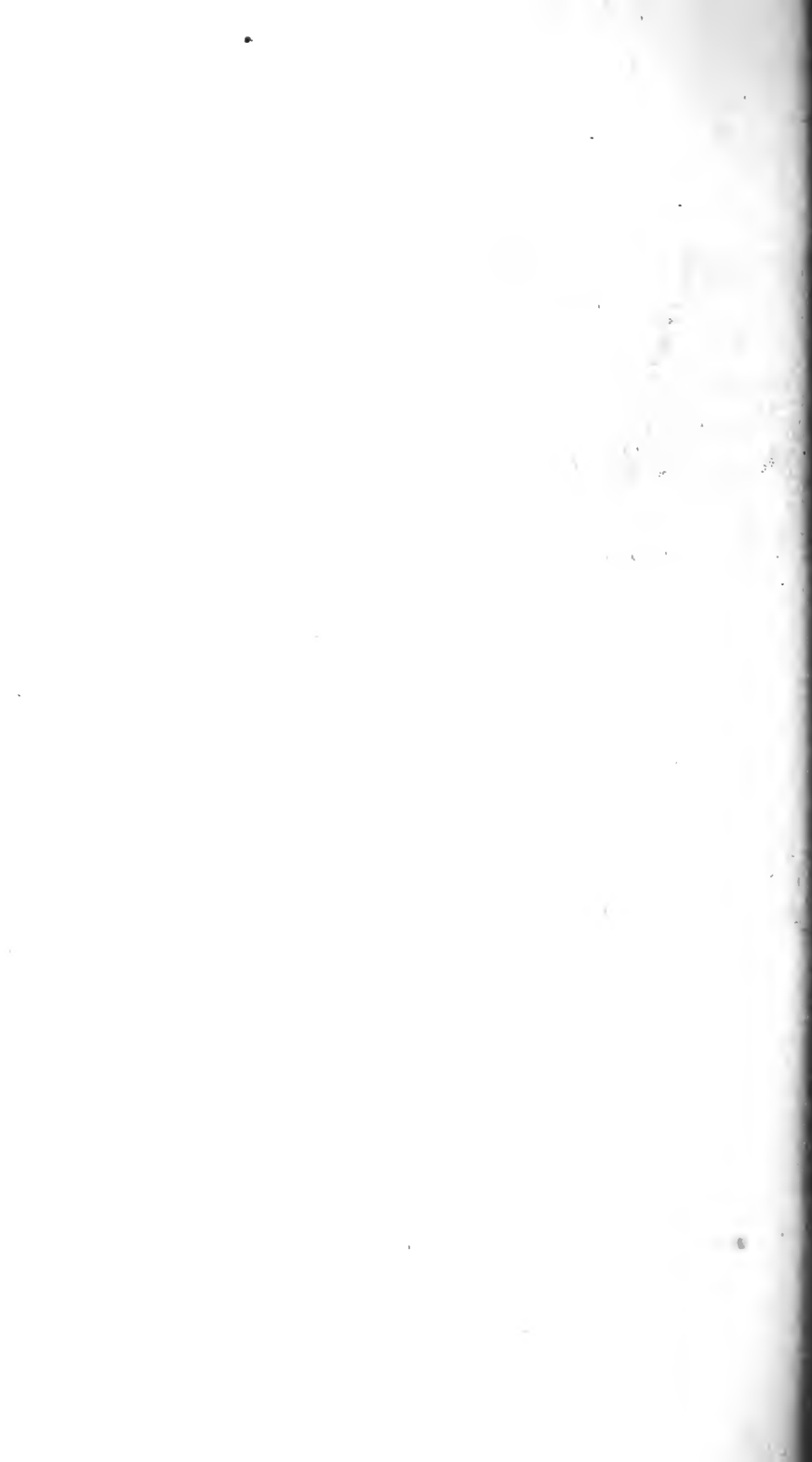
Throughout this booklet, PANTHER PATCHING MATERIAL and BATTLESHIP PLASTIC CEMENT are mentioned in conjunction with BATTLESHIP LIQUID ASBESTOS ROOF COATING. If you do not have one of these materials, you may make various substitutions. Where, PANTHER PATCHING MATERIAL is mentioned, you may substitute with tin, canvas, burlap, muslin or roofing paper. BATTLESHIP LIQUID ASBESTOS ROOF COATING may be substituted where BATTLESHIP PLASTIC CEMENT is mentioned.

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*Appeal from the District Court of the United States
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HON. SAMUEL M. DRIVER, *Judge*

APPELLEE'S BRIEF

JEROME WILLIAMS

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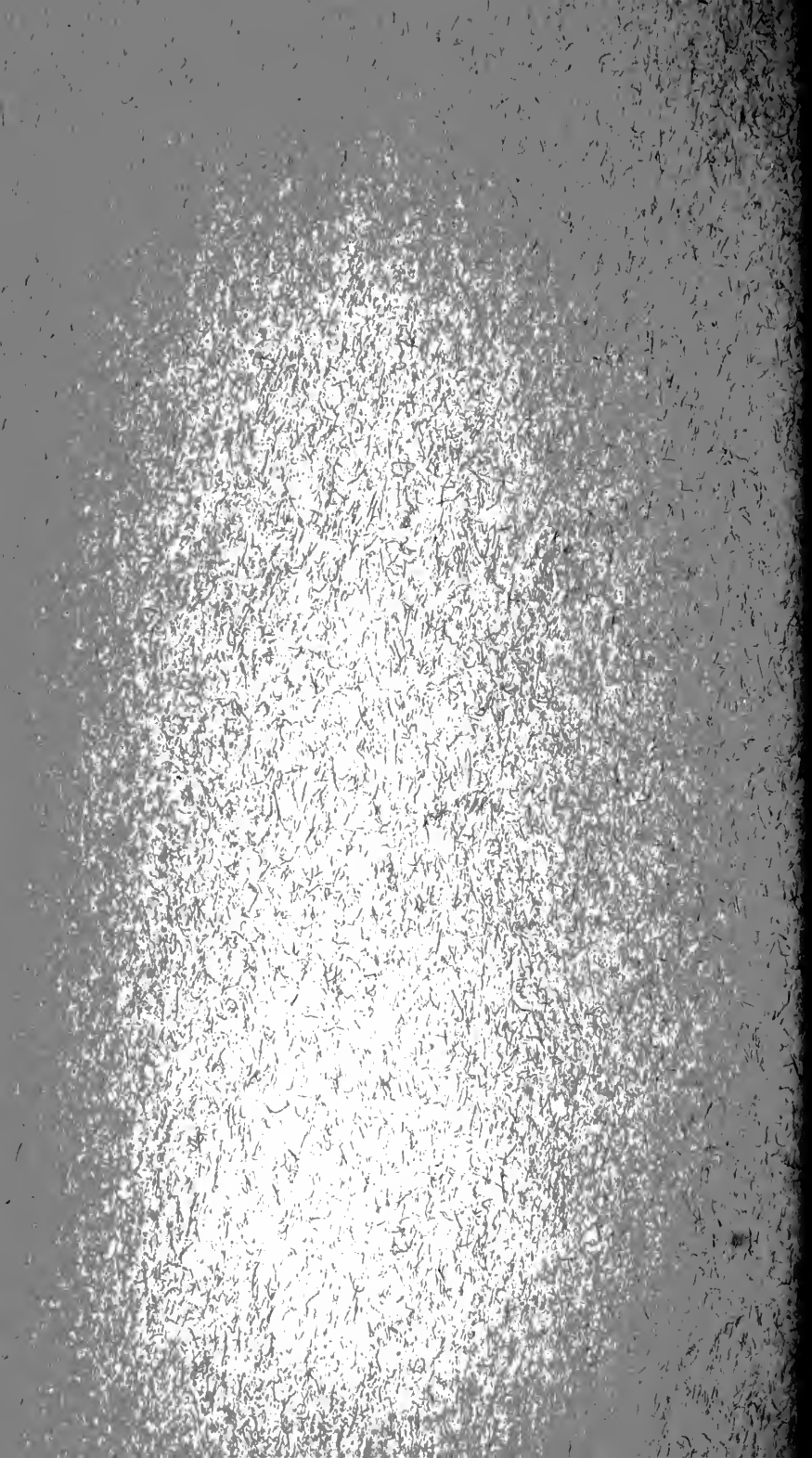
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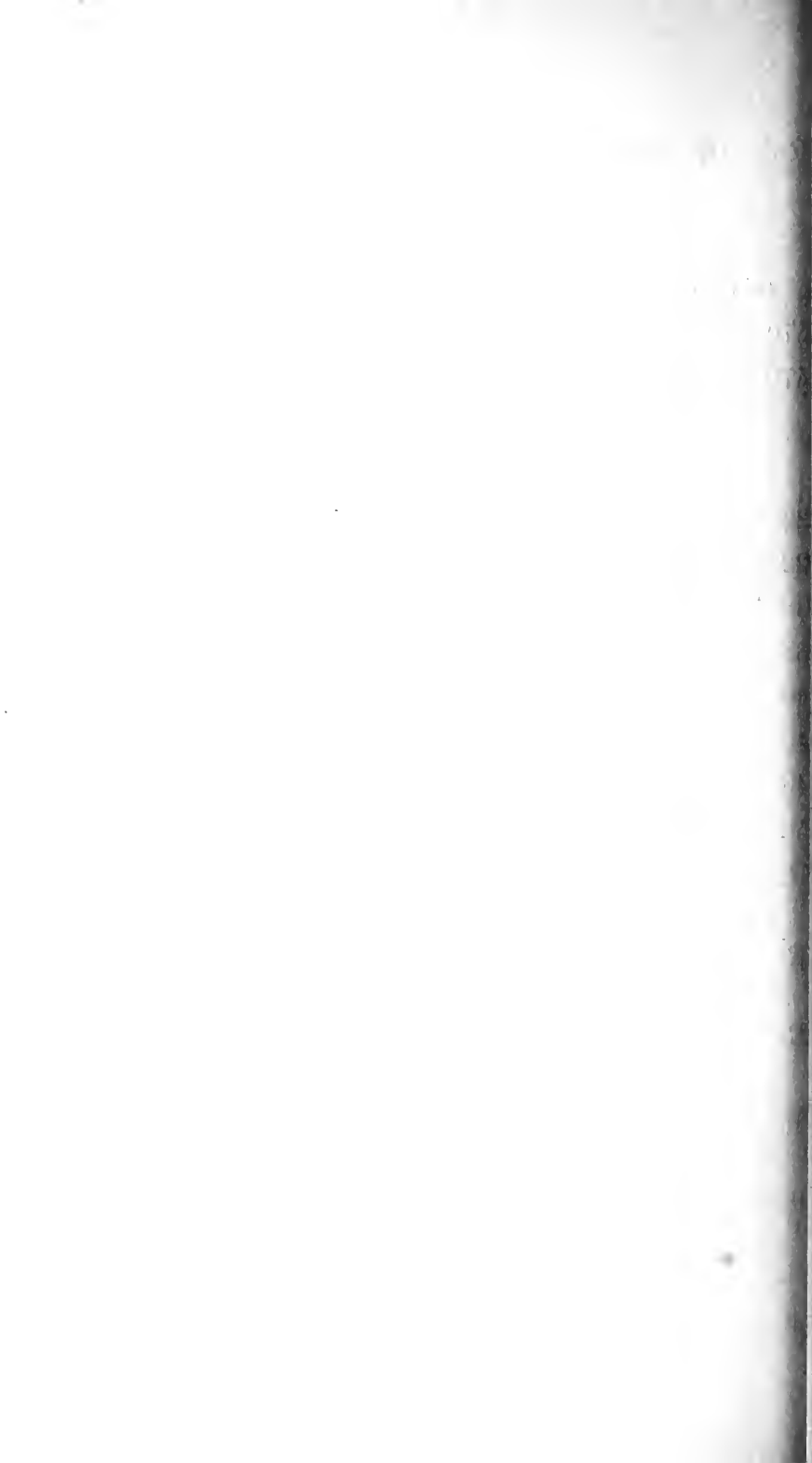
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APPELLEE'S BRIEF

JURISDICTION

Appellee agrees with the statement contained in appellant's brief as to the jurisdiction of the District Court and the jurisdiction of this Court to review the judgment.

STATEMENT OF THE CASE

With one exception, appellant's position on this appeal is that the District Judge should have directed

a verdict in its favor because (1) appellant claims that there was no evidence of negligence on the part of appellant, and (2) appellant claims that plaintiff/appellee was contributorily negligent as a matter of law. It is elementary that in considering these two contentions the evidence is to be viewed in the light most favorable to appellee and appellee is entitled to all reasonable inferences which can be drawn. Notwithstanding this, appellant's statement of the case only states the evidence favorable to appellant and completely ignores the evidence on the basis of which the District Judge correctly ruled that issues of fact were presented for the determination of the jury, both as to negligence and contributory negligence. Also, appellant's brief contains many erroneous statements as to the facts, which are too numerous to deal with individually. We are therefore taking the liberty of making a full statement of the facts which clearly warranted the submission of the case to the jury.

Plaintiff/appellee, John Norman Segerstrom, as administrator of the Estate of H. N. Segerstrom, deceased, operated a large apple orchard property near Spokane, comprising about 440 acres (Tr. 55). On the land was a packing and cold storage building approximately 550 feet in length and 50 feet in width, which was used for the handling of the yearly crop (Tr. 56). The packing house portion of the building was constructed over 30 years ago, but the cold storage section was constructed in 1947 and was modern in every respect, having concrete floors throughout, concrete block walls 18 feet in height, and a trussed

arch-type roof with no center supports (Tr. 62, 69, 72, Ex. 20). The entire building and contents were largely destroyed by an explosion and fire on July 8, 1953, and this suit was brought by Segerstrom against appellant, Panther Oil & Grease Manufacturing Company, to recover for the loss sustained (Tr. 56).

The facts upon which the liability of appellant for this fire damage are based and which were proved upon the trial are the following:

About March 20, 1953 a Mr. Brynildson, representing appellant oil company, called at Mr. Segestrom's home and inquired as to whether the cold storage building was in need of re-roofing (Tr. 57). Mr. Segerstrom was not acquainted with either Mr. Brynildson or the Panther Company, but it happened that he did contemplate re-roofing the building (Tr. 57). Thereupon, Mr. Brynildson solicited Mr. Segerstrom to purchase appellant's product, Battleship Liquid Asbestos Roof Coating (Tr. 57). Mr. Brynildson stated at the time that the roofing could be applied by any amateur and did not require skilled labor (Tr. 58). As a result of the conversation, Mr. Segerstrom signed an order for 325 gallons of the roof coating and also ordered 162 gallons of another product, Battleship Primer, because Brynildson stressed the need of using a primer prior to applying the roof coating (Tr. 57). Nothing was said by Brynildson at this time as to any hazard connected with the use of the material or that it might be subject to explosions or fire, or that there was any danger in heating or using the material inside a building (Tr. 58).

About a week later (March 27, 1953), appellee Segerstrom received a form letter of thanks from the Panther Company (Ex. 19) and also a pamphlet entitled "Instructions for Applying Battleship Asbestos Roof Coating" (Ex. 14). Segerstrom looked this pamphlet over upon its receipt and observed that it contained instructions only as to the roof coating and no instructions as to the application of the primer, except that it recommended that a primer coat should be used (Tr. 59). He also observed at the time the following on page 3 of the pamphlet (Ex. 14):

"Do not heat or thin Battleship. Do not heat Battleship with an open flame. Do not thin it. *When either is done, the water-proofing qualities of Battleship are damaged. Hence, a proper job is impossible.* If, in extremely cold weather it is necessary to heat Battleship, do so by placing the drum in a warm room 72 hours before the material is to be used." (Italics ours)

This pamphlet was the only communication received by Segerstrom from the appellant company at any time prior to the fire of July 8, 1953 (Tr. 58). Segerstrom further testified that his college education consisted of a liberal arts course, that he never had any training in chemistry or engineering, that he at no time knew that either the roof coating or the primer contained asphalt or any petroleum products, that he was not aware that there was any hazard of explosion or fire about the product, and that in fact, by reason of the word "asbestos" in the name of the product, he was led to believe that it was fireproof (Tr. 60-64).

Early in April, 1953 the Battleship Asbestos Roof Coating and Battleship Primer arrived, contained in

nine 55-gallon drums, 3 of the drums being primer (Tr. 60, 67). *None of the barrels had any warning label or instructions of any kind affixed* (Tr. 67, 68, 224). Each barrel had only one label which displayed the picture of a battleship, the name of the product and the words, "Manufactured by Panther Oil & Grease Manufacturing Company" (Tr. 67). Copies of these labels are in evidence as Exhibits 23 & 24. It was stipulated that all of the primer shipped to Segerstrom was a uniform product made according to appellant's specifications (Tr. 19, 103-104).

Despite the fact that the barrels carried no warning label of any sort, and the instruction booklet (Ex. 14) contained no warning of any explosion or fire hazard about the products, the evidence disclosed that the primer, as manufactured and sold by appellant, was a highly volatile and dangerous liquid, having flash and explosive characteristics equal to gasoline when exposed to normally experienced atmospheric conditions and temperatures (Tr. 122, 136-138, 141, 152). When the primer was at temperatures above 80° F. (its specified flash point), it would emit explosive vapors in sufficient quantity to cause explosions (Tr. 122, 138, 248). In fact, about 40% of the primer, according to appellant's own witnesses, was a petroleum distillate comparable to gasoline, and in fact gasoline, although not so called (Tr. 228, 250-252, 254, 257-258). The remaining 60% of the primer was the petroleum product known as asphalt (Tr. 198). *According to the witnesses, the primer, mixed according to appellant's own specifications, was more dangerous than straight naphtha* (Tr. 142, 256), and equally as dan-

gerous as gasoline in terms of hazard of flash fire or explosion at temperatures above 80° F. (Tr. 124, 141). A safer solvent of higher flash point could have been used but at greater expense (Tr. 140-141).

As before stated, the material was received by Segerstrom early in April, 1953 and at his instructions his foreman, Rhea Rosenbaum, put the barrels in the warehouse as it was not anticipated that the material would be used for re-roofing the building until the slack summer season when Segerstrom's farm employees would be without other work to do (Tr. 61). The material remained in the cold storage warehouse from early in April until July 6th, during which time the refrigeration equipment was not in operation and the inside temperature of the building, according to the experts, had long since normalized with the outside temperatures (Tr. 67, 143-144, 212-214).

On July 6th Foreman Rhea Rosenbaum decided to put his crew to the work of applying the roofing, and discussed the project that evening with Mr. Segerstrom (Tr. 68). The following morning (July 7th), Rosenbaum and his crew attempted to draw off some of the primer from the barrel to start the roof application and found that it was much too thick to use (Tr. 68). He thereupon placed the barrels of primer on a loading dock at the south side of the building where they were directly exposed to the sun's rays during the entire day of July 7th, the temperature on that day reaching 90° F. (Tr. 68, 212). The following morning, July 8th, Rosenbaum and his crew brought one of the barrels of primer inside the building for the purpose of commencing the roofing appli-

cation and again found the material too thick to apply, although it was thinner than the day before (Tr. 68-70). Thereupon, Mr. Rosenbaum concluded that it would be necessary to apply some heat to the primer in order to get it into condition so that it could be used, and he then decided to fashion a stove from a used 55-gallon barrel over which the material could be heated (Tr. 70-71). He proceeded to make such a stove, a drawing of which is in evidence as Exhibit 21, and this stove was placed in the exact middle of the main storage room in the cold storage building, and after building an apple wood fire in the stove and permitting it to burn down to coals, the primer was drawn from the barrel into 5-gallon pails, 2 of which at a time were placed on angle iron supports over the opening in the top of the stove (Tr. 71-72).

The reason why Rosenbaum decided to conduct the heating inside the building was that it was more convenient, as the only access to the roof where the material was to be used was by means of an opening or manhole extending to the roof through the ceiling of this room (Tr. 69, 73). The room was empty, was 50 feet x 160 feet in dimensions, had a concrete floor, the walls and ceiling were tongue and groove, and the ceiling was 18 feet above the floor (Tr. 69, 72, 74, Ex. 20). This room and the building otherwise had many doors 6 feet or more in width, all or substantially all of which were open (Tr. 69, Ex. 20). The stove was placed in about the exact center of the room, which meant that it was 25 feet from the nearest wall, except for concrete walls enclosing a small compressor room which abutted into the main room (Tr. 72, 69).

Rosenbaum testified that he know that this primer was a petroleum product but had no idea that it was of an explosive nature. He only felt that it would burn if it came in direct contact with fire and would then only result in a fire of minor proportions which could not possibly involve the walls or ceiling of the room because of its huge size; and overall he felt there was no danger to the building in what he was doing (Tr. 71, 73, 74, 84, 86). He assigned one of the crew, Tom Woods, to place the buckets over the stove and cautioned him not to spill any of the material and to keep the fire in a state of coals (Tr. 72, 84). Also Rosenbaum had previously observed, as all of us have, that roofing materials are commonly heated over fires by professional roofing crews prior to application, and he stated that this is where he got the idea (Tr. 70, 86).

The heating of the primer in the foregoing fashion commenced about 8:30 or 9:00 a.m. on July 8th and continued steadily and without incident until noon (Tr. 73, 90). The procedure followed by Tom Woods was to place two buckets of the primer on the stove and test the material with his finger until it was warm and had thinned somewhat, which would take 10 or 15 minutes, and he would then hoist the buckets to the roof by means of a rope, where the material would be spread by two other members of the crew (Tr. 89). In this fashion by noon the majority of one barrel of the primer was used (Tr. 90). None of the material ever spilled or dripped on the floor (Tr. 74, 90-91).

The crew ceased work from noon until 12:30 p.m., during which time a member of the crew remained

in the room to watch the stove at the direction of Foreman Rosenbaum, the other members of the crew going to their nearby homes to lunch (Tr. 73, 90, 96). No wood was added to the fire during the lunch period or thereafter until the disaster occurred, and there were only coals and no flame in the stove (Tr. 90, 91, 97). Also, no buckets were on the stove during the lunch period (Tr. 90, 97).

At 12:30 p.m. Tom Woods and the remainder of the crew returned, and Woods placed 2 buckets on the fire, the one to the rear of the stove being less exposed to heat (Tr. 91). After about 10 or 15 minutes Woods took the front bucket to the roof, returned and tested the other bucket and found that it was warm and seemed to be about ready for application (Tr. 91). He thereupon started toward the barrel of primer to draw another bucket, the barrel being located some 30 feet away at the south wall (Tr. 91). While proceeding towards the barrel, with his back to the stove, he heard an exceedingly loud sound which he described as "a great big Whoosh," a sound such as he had never heard before, and upon turning around he observed the entire ceiling of the huge room in flames, billowing downward (Tr. 91-92). At this time, there was no fire coming off the bucket or stove, or from the floor, and none of the material had ever been spilled on the floor (Tr. 91-92).

Another witness, Ira Hoskinson, at the same time was driving a car from the west toward the building, directly in line with the large doors which were open, so that he was looking directly into the room in question, and he stated that he suddenly saw a huge flash,

lighting up the entire interior of the building in a crimson, fiery orange color (Tr. 101-102). The explosion and fire just described quickly involved the entire building and substantially destroyed it, despite the efforts of the rural fire department which was summoned (Tr. 56, 74, 102-103). Witnesses for both appellant and appellee conceded that what had occurred was that the primer, by reason of its flash point of about 80° F., had been emitting gas vapors into and throughout the huge room, and that when these vapors became concentrated with the air in the room in a ratio of about 3 parts gas vapor to 100 parts air, a so-called explosive mixture came to exist in the room, which was caused to explode from some spark, either about the barrel stove or elsewhere in the room, that this initial explosion was instantly followed by a rapid burning or explosion of all the dust about the walls and ceiling of the room, all of which caused intense heat and a rapid spread of the fire throughout the building (Tr. 153-154, 160, 224). What Woods saw on turning around was not the initial gas explosion, but the ensuing dust fire (Tr. 154). It was conceded by all of the experts that the primer itself did not ignite, but only the invisible, insidious gas vapors which had been emanating from it (Tr. 154, 160, 224).

Foreman Rosenbaum, Tom Woods and appellee Segerstrom all testified that they had no prior knowledge that material of this sort, even when heated, was subject to giving off any such explosive gas vapors (Tr. 60, 67, 71, 74, 92). None of the crew detected any tell-tale odor from the primer (Tr. 74, 92, 98).

All of the experts testified that flash point is a measure of the explosive hazard of a petroleum product and indicates the temperature at or above which the material is emitting gas vapors in sufficient quantity to cause an explosion (Tr. 109-110, 122, 137-138, 224-225, 248-249). Furthermore, the experts, J. M. Kniseley, Leonard L. Bergunder and James G. McGivern, all testified that it was the custom of prudent manufacturers as to any products having flash points below 100° F. to affix to the container a suitable red warning label, and even as to products having flash points between 100 and 150° F., the custom was to affix some warning such as to not heat, or get close to an open flame, and to use in a well-ventilated room (Tr. 122, 141-142, 161). They further testified that such warning labels were necessary when the flash point, as with this material, was within the range of normally experienced atmospheric temperatures (Tr. 132, 153).

Exhibits 77, 78, 79 and 80 are cans containing similar roofing primer of four reputable manufacturers which were purchased in the open market in Spokane. Exhibit 77 was Johns-Manville Regal Roof Coating which had a flash point of 116° F. and had the following prominently on its label, "Keep away from open fires" (Tr. 287). Exhibit 78 was Pioneer-Flintkote Asbestos Roofing Coat which had a flash point of 136° F., and on this can in capital letters appeared the following: "DO NOT HEAT OVER DIRECT FIRE" (Tr. 287). Exhibit 79 was Celotex Asphalt Roof Coating which had a flash point of 85° F. and on the label of which in capital letters ap-

peared, "CAUTION: DO NOT HEAT NEAR FIRE" (Tr. 287). Exhibit 80 was a product called "Dri-N-Tite, The Modern Method of Roof Resurfacing, Primer Black," and had a flash point of 130° F. and on its label prominently appeared, "Caution: Keep Away From Open Flame and Use in a Well-Ventilated Place" (Tr. 288).

The evidence established that the primer when opened by Foreman Rosenbaum was much thicker than when manufactured, and it appeared that it was a characteristic of this type of material that it sometimes jelled in the barrel (Tr. 203, 232, 254). Appellant's assistant vice-president and research director, Ralph Uhrmacher, testified that it was known to him and his company that this material was subject to this jelling tendency after manufacture and that the primer might have been in its thickened condition when received by Segerstrom (Tr. 232). Appellant's expert, Homer Schauer, also testified as to the same jelling tendency of this type of product and stated that it occurred when asphalt was thinned or diluted with gasoline (Tr. 254). Elsewhere in Mr. Schauer's testimony, it appears that Battleship Primer as manufactured is diluted with what amounts to gasoline, although not so called (Tr. 250-258).

Appellee Segestrom in originally instituting this suit charged both breach of warranty and negligence in failing to warn. Subsequently, the allegations of breach of warranty were abandoned and the case proceeded to trial upon the charge of negligence of the

manufacturer, Panther Oil & Grease Manufacturing Company.

On the trial, the District Judge instructed the jury as to §70.74.300 of the Revised Code of Washington (appellant's Specification of Error III), upon the basis of the testimony that the Battleship Primer in its entirety was more explosive, combustible and dangerous than some of the straight naphthas, naphtha being a generic term embracing petroleum distillates with flash points ranging from 0° F. to 140° F. (Tr. 142), and also on the basis of testimony that, when over its flash point temperature, the primer was as dangerous as gasoline as to the hazard of flash fire or explosion (Tr. 141).

The trial of the cause resulted in a verdict and judgment in the sum of \$111,035.00, from which this appeal has been taken by defendant Panther Company.

APPELLANT'S SPECIFICATIONS OF ERROR

We call attention to appellant's Specification of Error III dealing with the Court's instruction on §70.74.300 of the Revised Code of Washington and particularly direct attention to appellant's statement at this point as to the exception taken to this instruction (App. Br. p. 15). In this connection we respectfully refer the Court directly to the record as to the exception taken to this instruction by appellant (Tr. 316-318). The reasons then and there assigned for the exception were only the following: That the statute is intended to, and does apply only to the items

mentioned when they are in an unadulterated condition; that the statute is no longer in effect; that there is a later statute covering the handling of explosives and defining explosives, being Chapter 111 of the Laws of 1931 (Revised Code of Washington §70.74.010), and that the substance in question is not within that statutory definition; and that the statute does not properly apply to the sale of roofing primer intended for application to an exterior surface of a building.

These reasons have now been abandoned and appellant's present arguments directed at this instruction are entirely after-thoughts.

SUMMARY OF ARGUMENT

1. Appellant Panther Company, though not the actual manufacturer of the primer, is liable as though it were the manufacturer, since it sold the product as manufactured by it. The evidence established beyond dispute that the primer, as manufactured according to appellant's own specifications, is an inherently dangerous product, imposing upon appellant company the positive duty to give adequate warning to the public of the inherent danger. This duty appellant wholly failed to fulfil, either by labels on the containers, or otherwise, the language contained in its instruction booklet being in fact an indirect representation of safety. Appellant admittedly knew that the primer sometimes thickened after manufacture and that, absent a warning, someone might attempt to heat it. Clearly, therefore, appellant was guilty of negligence in failing to warn.

2. Appellant's failure to warn was the proximate cause of the explosion and fire, or at least, the issue of proximate cause was for the jury. Appellee's employees testified unequivocally that, had there been a warning label on the barrels, they would not have heated the primer as they did.

3. Appellee Segerstrom and his employees were not contributorily negligent, or at least that issue was also for the jury. Appellee and his employees all testified that they had no knowledge or reason to believe that the primer was a dangerous substance or that, by heating it, explosive vapors would be emitted from it. Furthermore, appellant's literature stated that the material could be applied by unskilled labor, and appellee's employees were in that category, with a layman's ignorance of the chemical characteristics of the primer.

4. The District Judge did not err in giving the instruction regarding Revised Code of Washington §70.74.300. That statute is not obsolete, and there is no evidentiary basis for so contending; it has been included in all codifications of the laws of the State of Washington, including the 1951 Code. The statute is not ambiguous and required no judicial construction; appellee's theory and arguments as to the instruction were wholly consistent with the construction required by the rule of *ejusdem generis*; and appellant did not request the District Judge at any time to construe the statute for the jury. The words "or other explosive or combustible substance" include any substance having a hazard comparable to the stated substances; the evidence established that the primer

in its entirety was at least equally as hazardous as certain of the stated substances, and this was the sole basis on which the matter was argued to the jury. No contention was ever made to the jury that the primer was within the statute because it contained a percentage of gasoline; our whole position was that the product as a whole was as hazardous as gasoline and more hazardous than naphtha. Furthermore, the reasons assigned against this instruction by appellant in its brief should not be considered by this Court because the arguments now advanced were not stated to the District Judge in support of the exception taken to this instruction.

ARGUMENT IN SUPPORT OF THE JUDGMENT

The only two issues of fact upon the trial of this case were the negligence of appellant Panther Oil & Grease Manufacturing Company and the claimed contributory negligence of appellee or his employees.

1. Negligence of Panther Oil & Grease Manufacturing Co.

Although the Battleship Primer in question was actually manufactured by Sandard Oil Company at Casper, Wyoming, it was sold as the product of appellant and the label bore the words "Manufactured by Panther Oil & Grease Manufacturing Co." Under these circumstances appellant is liable as though it were the manufacturer.

Restatement of the Law of Torts, §400, p. 1086;

22 Am. Jur. 195, Explosions §71, Note 3;

46 Am. Jur. 942, Sales §817, Note 20.

It is the duty of one who manufactures an inherently dangerous product for sale to the public to give warning of the danger inherent in the product, and such manufacturer is liable for damages because of injury to person *or property* proximately caused by his failure so to warn.

Restatement of the Law of Torts, §397, pp. 1081-1083;

22 Am. Jur. 195, Explosions §71;

Tingey vs. E. F. Houghton & Co. (Calif.), 179 Pac. (2d) 807, 811;

Standard Oil Co. vs. Lyons (8th C.A.), 130 Fed. (2d) 965;

Genessee Relief Assoc. vs. Sonneborn (N.Y.), 189 N.E. 551;

Weiser vs. Holzman, 33 Wash. 87, 73 Pac. 797;

Theurer vs. Condon, 34 Wash. (2d) 448, 461; 209 Pac. (2d) 311, 318.

This primer was an inherently dangerous product.
46 Am. Jur. 939, §815, Note 17.

The warning must be adequate, and an inadequate warning is in legal effect no warning.

56 C.J.S. 1053, §290, Note 49;

Fidelity Trust Co. vs. Wisconsin Iron Works (Wis.), 129 N.W. 615, 618;

Sadler vs. Lynch (Va.), 64 S.E. (2d) 664, 666;

McClanahan vs. Calif. Spray Co. (Va.), 75 S.E. (2d) 712, 718.

If the manufacturer has reason to believe that the inherently dangerous product may be used by someone other than the immediate purchaser, the duty to

warn can only be fulfilled by affixing a label to the container itself.

Restatement of the Law of Torts, §397, p. 1082 (Comment b).

It could scarcely be challenged that this Battleship Primer, as manufactured, was an inherently dangerous product and that the purchasing public was entitled to be warned thereof. Appellant's own specifications for the manufacture of the product, Exhibit 25, permitted its manufacture with a flash point as low as 80° F. (Tr. 104-105). The records of the actual manufacturer, Standard Oil Company, show that, as manufactured, the material had flash points ranging from 85° to 100° F. (Ex. 63, Tr. 257). The tests made on the actual primer delivered to Mr. Segerstrom, one barrel of which escaped the fire, yielded flash points ranging from 81° to 91° F. (Tr. 111, 122, 136).

By distilling off the 40% solvent portion of the primer, the entire solvent was found to have a flash point of 57° F., and portions of the solvent were found to have flash points below 0° F. (Tr. 111, 123-124). This primer is a mixture, not a compound, and the characteristics of each portion of the mixture, including the solvent, continue into the mixture (Tr. 121, 138). The expert witness Kniseley testified that the entire primer was as dangerous as the solvent portion alone, and that this primer was more hazardous than its flash point would indicate because of the presence in the mixture of extremely light, volatile fractions (Tr. 124, 136, 139).

Appellant's witness, Homer Schauer, a chemical engineer at the Standard Oil Company refinery where the product was made, testified that the 40% solvent portion of the primer came from the second still in the chain of six stills through which the crude petroleum is refined. The first still takes off the very lightest, most volatile parts of the crude, including the true gases, and also the pentanes and butanes which are gases but can be compressed into liquid. The product of the second still, which at times is used in the manufacture of this primer and similar products, otherwise is used to make gasoline (Tr. 250-259). In order to make the product of the second still into gasoline, it is necessary to improve its octane rating, and this simply means adding substances which make it ignite *less readily* (Tr. 251-252). In other words, the chief difference between the product of the second still and gasoline is that the finished gasoline ignites less readily and that winter grades of gasoline contain additives to lower the flash point into the winter range of temperatures (Tr. 251-252). Mr. Schauer declined to call the product of the second still gasoline, stating that at his refinery the term "gasoline" is only used to designate the end products actually destined as motor fuel, but the substance of his testimony is that it is gasoline nonetheless (Tr. 253-254).

In *Standard Oil Co. vs. Lyons* (8th C.A.), 130 Fed. (2d) 965, the Court was concerned with an action for wrongful death and for property damages arising out of an explosion and fire originating from gas vapors from an asphalt primer, apparently much the same as the product here involved. There, the work-

men were applying the primer inside a tank when the vapors ignited in some unexplained fashion. In affirming a judgment against the manufacturer, the Court said, among other things,

“The asphalt primer coat sold by the defendant is a liquid containing 50% asphalt and 48% naphtha. It (believed to refer to the naphtha portion) has a flash point of about 30° F. The flash point is that temperature at which the naphtha tends to give off a gas which will flash in the presence of a flame or spark. The naphtha was the solvent in the primer. Safety solvents are those which have a flash point above 110° F., while solvents which have a flash point below 110° F. are regarded as highly inflammable and relatively dangerous. * * * It was delivered in barrels by defendant at the tank where it was being applied. The barrels contained no warning label as to danger in its use or application. The barrels had labels identifying the product as a primer coat and the name of the manufacturer. They were a muddy, dutsy red in color. * * * Defendant was the manufacturer and seller of this dangerous product. The product was so manufactured that it was ready for immediate use. It was inherently dangerous. The jury having found that the danger was not known to C. Holmquist & Co., the purchaser, nor to the plaintiff, and not being patent, it was incumbent upon the defendant to give warning of the danger in its use, if that danger could not be discovered by a reasonable inspection. * * * No representative of defendant told him that the primer or its fumes were inflammable, volatile or explosive, or that the primer contained 48% naphtha which had a flash point of less than 50° F. * * * The product, Korite Primer, was a dangerous substance, and it was the duty of the defendant to give adequate warning to plaintiffs with reference to its use in the underground tanks. The mere fact that the sub-

stance was known to contain naphtha was not, without more, sufficient warning.”

See also:

Gennessee County Relief Assoc. vs. Sonneborn (N.Y.), 189 N.E. 551;

Thornhill vs. Carpenter-Morton Co. (Mass.), 108 N.E. 474, 491;

Frazier vs. Ayers (La.), 20 So. (2d) 754.

In addition to the evidence already related as to the inherently dangerous nature of the product, it is undisputed that this type of product has a known tendency to jell or thicken in the barrel at times, which tendency was known to appellant company (Tr. 232, 254). In view of this, appellant must be held to have had reason to believe that some of its purchasers would be faced with the necessity of thinning this material in some fashion before using it, and that some of such customers would resort to heat to do so. That reputable manufacturers anticipate that, as to this type of product, someone may attempt to heat it, is demonstrated by the warning labels on Exhibits 77 to 80, all saying in effect, “Do not heat or use near an open flame.”

Appellant also had ample reason to anticipate that the material might be opened and used or heated inside a building. All of its literature, including Exhibits 13, 14, 15 and 62, disclose that the Battleship materials were being sold to commercial users and for large buildings. Anyone knows that access to the roofs of such buildings in many cases is through the interior. Anyone also knows that it is not uncommon nor necessarily considered hazardous to maintain open

fires for various purposes inside commercial buildings. Appellant, as the manufacturer of an inherently dangerous product, was required to anticipate the extraordinary, not the ordinary.

22 Am. Jur. 135, Explosions §14.

Appellant's salesman, in selling the product, represented to Mr. Segerstrom that it could be applied by his unskilled labor, and the literature furnished to Mr. Segerstrom in many places states, "Easily applied by unskilled labor" (Ex. 13, 14, 15, Tr. 58). Appellant was, therefore, bound to anticipate what unskilled persons, having no knowledge of the characteristics of such materials, might do. The Celotex Company, Pioneer-Flintkote Company and Johns-Manville Company certainly anticipate what some uninformed person might try to do with such products, in view of the warnings placed on their containers (Exs. 77-80).

Throughout the trial and on this appeal appellant has contended that its instruction booklet did contain a warning where it said, "Do not heat or thin Battleship. Do not heat Battleship with an open flame. Do not thin it. When either is done the water-proofing qualities of Battleship are damaged." On what basis it can seriously be contended that this constituted a warning, we fail to see. The law requires a warning *of the danger*. There is nothing here about any danger. On the contrary, this language actually amounts to an indirect representation that there is no danger, that only the water-proofing qualities will be affected by any heating. It seems

quite likely that this company placed this language in its instruction booklet, fully knowing of the danger, in an attempt to escape liability without adversely affecting the saleability of the product. Its witnesses did not explain in what respect either heating or thinning would interfere with the water-proofing qualities.

Furthermore, if the above language could be considered a warning of danger, how could a warning contained in an instruction booklet be considered adequate, where the manufacturer knew that laborers would probably be actually using the product, rather than the owner? On the basis of appellant's reasoning, if a large quantity of this primer was sold to the federal government, and an instruction booklet was sent to the President, appellant's duty to warn would be fulfilled. The place for a warning, of course, is on the barrels themselves.

Though we believe this primer should be held inherently dangerous as a matter of law, the District Judge did not so rule, but submitted the question to the jury, and this was resolved by the verdict in appellee's favor. It being inherently dangerous, the law is clear that there was a duty to warn, and there most certainly was no compliance with that duty here.

The District Judge likewise submitted to the jury the question of whether the failure to warn was the proximate cause of the damage, which also was resolved by the verdict in appellee's favor. As to this phase, Foreman Rosenbaum testified that he didn't think there was any danger in heating the material

because he hadn't seen anything on the barrels or any instructions to that effect (Tr. 73). He further specifically testified, "Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did" (Tr. 87).

We submit that the evidence most strongly supports the jury's finding of negligence on the part of appellant in failing to warn and also on the issue of proximate causation, and certainly the evidence was sufficient to carry these questions to the jury.

2. Alleged Contributory Negligence.

The record in this case is absolutely devoid of any evidence that either Mr. Segerstrom or Foreman Rosenbaum or any member of the crew knew of any danger that this product, while being heated in the fashion pursued, might cause an explosion or any fire which might communicate to and damage or destroy the building. Unquestionably Rosenbaum and others of the crew knew that the material might burn on direct contact with a fire, but their testimony is that they only considered that small flames might result, falling far short of the ceiling of the room and nowhere near the walls (Tr. 73, 84-85, 86). It should be remembered that the floor of this huge room was concrete, the entire floor area was empty, the nearest wooden wall was 25 feet from the stove, and the ceiling was 18 feet above the floor (Ex. 20, Tr. 72, 74). The majority of the large outside doors were open (Tr. 73).

Mr. Segerstrom testified that he thought the material he was purchasing was "Liquid Asbestos," that he had no knowledge that it was a petroleum product and that he had no knowledge whatever that it was dangerous in any respect (Tr. 61-62). That Mr. Segerstrom thought the material was "Liquid Asbestos" and fireproof is understandable. This manufacturer, for the purpose of influencing the public to buy its product, called it "Liquid Asbestos Roof Coating" obviously for the purpose of creating the impression that it was fireproof. In furtherance of that design, it incorporated in its instruction booklet an indirect, false representation that it was fireproof where it stated that the only consequences of heating the material would be to damage the water-proofing qualities.

Segerstrom also, on reading the instruction booklet, noted that it purported only to be "Instructions for applying Battleship Asbestos Roof Coating." Nowhere did the booklet purport to be instructions for applying the roof primer, and there were no instructions as to the roof primer in the booklet. In fact, the only reference to the roof primer throughout the booklet was a suggestion that under certain circumstances it would be advisable to use a priming coat. Therefore, Mr. Segerstrom was correct in informing Mr. Rosenbaum that he had received no instructions as to the primer.

Foreman Rosenbaum searched the barrels for any instructions or warning on the labels and found none (Tr. 67, 70, 73). Before determining to heat the

primer over the applewood coals he placed the materials for an entire day in the direct rays of a hot sun and was still faced with the necessity of further thinning the material in some manner (Tr. 68-70). He had no knowledge that the material was subject to emitting explosive vapors and only thought that it might burn with flames of small proportions upon direct contact with fire (Tr. 71). To guard against this, he directed that the fire be permitted to burn down to coals before the buckets of the material were placed over it and also directed that precautions be taken against spilling any of the material, both of which things were done by the crew (Tr. 72, 90-91, 94). He had therefore taken all necessary and reasonable precautions against any danger known to him. He further testified that had he known the material was subject to giving off explosive vapors or had there been a warning on the barrels, he would not have heated the material in the manner followed (Tr. 87). Rosenbaum categorically testified that he did not realize that there was any danger connected with what was being done (Tr. 73, 86-87).

Tom Woods, the only member of the crew having anything to do with the heating of the primer, testified that he had only an 8th grade education and had no knowledge or experience as to petroleum or asphalt, that he would not have participated in the heating of the primer if he had known that it was giving off gas vapors, that he detected nothing other than a tar smell, and that he did not at the time consider that there was any danger (Tr. 92-93).

Neither Mr. Segerstrom nor any member of the crew had any special knowledge of this type of material. The name "Battleship Primer" on the barrel gave no clue as to the character of the contents of the barrel, nor was there any tell-tale odor (Tr. 74). Had the labels even so much as informed the men that the material contained gasoline or benzine or naphtha, they would doubtless not have heated it, as such names are understood by laymen as connoting danger. On the contrary, the term "Primer" is wholly innocuous.

Mr. Rosenbaum had seen professional crews heating roofing tars in and about buildings under construction or repair, and all of us have seen the same thing countless times. He stated that that was where he got the idea as to the heating method (Tr. 70, 86). The knowledge that Mr. Rosenbaum and other ordinary laymen do not have is that the tars being heated by professional roofers are so-called "Hot Roofing," having flash points in the neighborhood of 450° to 500° F. and therefore safe to heat up to those high temperatures (Tr. 177, 149-150). As with Mr. Rosenbaum, the ordinary layman does not know that so-called "Cold Roofings" such as the Battleship products, are vastly different and contain highly volatile and dangerous solvents.

We venture to say that anyone of us, including the members of this Court, possessed of no more technical knowledge than Mr. Rosenbaum, would have thought that there was no danger in heating this material in the fashion employed by these men, in view of the

vastness of the room in which it was being conducted and the concrete floor therein. It is of some significance that, when appellant's expert witness Erickson undertook to simulate the method followed in heating this primer, and for that purpose constructed a similar barrel stove and built similar fires in it, he did so inside a building and within 15 feet of wooden walls (Tr. 183, Ex. 47, 48). It will be said that Mr. Erickson only had water in the buckets over his fire, but Mr. Rosenbaum and his crew had no knowledge that the material they were heating was any more dangerous than water.

The law is clear that an essential element of contributory negligence is *an appreciation of the danger*; knowledge of the physical characteristics of a material, such as knowledge that it is a petroleum product, is not enough.

38 Am. Jur. 864, Negligence §188;

38 Am. Jur. 1067-8, Negligence §358;

Heinlen vs. Martin Miller Orchards, 40 Wash. (2d) 356, 360; 242 Pac. (2d) 1054.

We fail to see any basis in the evidence for any claim that Mr. Segerstrom or his employees had any reason to believe there was any danger in the heating of this primer by the method employed, and in any event the issue was for the jury and was left to the jury by the District Judge. *They did not know of the danger because they were laymen and unskilled workers; and they had not been warned of the danger by appellant.*

ARGUMENT IN ANSWER TO APPELLANT

1. The Contention that There Was No Primary Negligence (App. Br. pp. 16-20).

Appellant first suggests that the primer was designed for use on the exterior of buildings, that appellant did not intend that it should be heated inside of a building and that appellant is not liable where it was used in a manner other than intended by the manufacturer. This argument is without validity. In 46 Am. Jur. 941 it is said,

“That the manufacturer does not intend that the article shall be used in a certain way will not relieve him from liability for injuries to one attempting so to use it, if, from the directions upon the package, a person of ordinary intelligence could conclude that it might be so used.”

Appellant next suggests (App. Br. p. 17) that large quantities of this material have been sold and used by the public without harm or disaster. In the first place there is no such showing in the evidence. The only evidence on the subject was the testimony of appellant's secretary and chief accounting officer, George Billingsley, that no claim on the part of any user had ever come to his attention; but he conceded on cross-examination that small claims would not come to his attention and that he would only hear about important claims, such as the one here involved (Tr. 264-265). Secondly, the mere fact that appellant com-

pany had managed to escape liability in the past is of no controlling consequence.

Thornhill vs. Carpenter-Morton Co. (Mass.),
108 N.E. 474, 491.

Appellant suggests (App. Br. p. 17) that Mr. Segerstrom and his employees ignored warnings. We are unable to understand by what license appellant claims that there was any warning. Surely it does not contend that the language on page 3 of the instruction booklet constituted a warning of danger. It would be monstrous if industry was permitted to absolve itself of its duty to warn by language such as was employed by appellant in its instruction booklet.

The balance of appellant's argument under this contention consists of a discussion of five cases, none of which have any similarity with the facts here involved. The following are cases with similar facts where manufacturers have been held liable for damages through explosion and fire caused by similar products, because they failed to affix warning labels.

Genessee County Assoc. vs. Sonneborn
(N.Y.), 189 N.E. 551;

Thornhill vs. Carpenter-Morton Co. (Mass.),
108 N.E. 474;

Standard Oil Co. vs. Lyons (8th C.A.), 130
Fed. (2d) 965;

Alligator Co. vs. Dutton (8th C.A.), 109 Fed.
(2d) 900;

Frazier vs. Ayres (La.), 20 So. (2d) 754.

2. Appellant's Contention as to Contributory Negligence (App. Br. pp. 21-31).

Typical of appellant's entire brief are the erroneous statements made in the course of the argument as to this contention.

On page 21 of appellant's brief it is said,

“Plaintiff stored this primer for more than three months (from April 1 to July 8, 1953) in an insulated cold storage room, whereby the primer lost its normal fluidity.”

The evidence by all witnesses is that there was no refrigeration in the building during this period, that the temperature in the room had long since normalized with the average outdoor temperature, and on July 8, 1953 the temperature of the primer in the room would have been at least 65° F. (Tr. 143-144, 213-214). Appellant also overlooks the evidence that the primer was left in the direct rays of the sun for the entire day of July 7, 1953 when the outside temperature was 90° F. Appellant also overlooks the testimony that the primer had lost its normal fluidity because it had jelled in the barrel, a tendency known to exist in this type of material (Tr. 232, 254). Appellant's vice-president, Ralph Uhrmacher, conceded that the primer remaining after the fire was too thick and that it could have been in that condition when received by Segerstrom (Tr. 203, 232).

Appellant also at page 21 of its brief reiterates its claim that the instruction circular warned against heating appellant's product. There was no such warning.

At page 23 of its brief, appellant reiterates that, during the noon hour, more applewood was fed into the drum. The testimony of Tom Woods and Elwood Rosenbaum was directly to the contrary, that no fuel was added during the noon hour and that there were only coals after lunch (Tr. 91, 97).

At pages 29-30 appellant asserts the claim that the substance equivalent to gasoline, which was determined to be in the primer by the experts who tested the barrel remaining after the fire, was not in it when manufactured, and appellant points to its evidence purporting to show that there was no possibility of gasoline getting into the primer during its manufacture. Appellant conveniently overlooks appellee's evidence which showed just as positively that no foreign substance could have gotten into the barrel of primer while it was in appellee's possession (Tr. 74-75, 82, 108, 120, 135-136, 285). It should be borne in mind that it was stipulated that the barrels of primer received by Mr. Segerstrom were the uniform product of appellant company (Tr. 19, 103-104). Contrary to appellant's contention here, its Mr. Uhrmacher admitted that gasoline might have been used as the solvent in manufacturing the primer according to the specifications (Tr. 228); and, according to other witnesses, safer solvents could also have been used but at greater cost (Tr. 141). Also, the Standard Oil Co. representative, Mr. Schauer, testified in substance that the equivalent of gasoline was used as the solvent in manufacturing the primer (Tr. 250-258). Appellant's chemists only checked one out of four of the shipments of this primer received from Standard Oil

Co. (Tr. 278). Appellant's chemist, Ralph Uhrmacher, ran complete tests on the primer remaining after the fire, and the only difference he detected from appellant's uniform product was a much greater viscosity (Tr. 217). Furthermore, all of the testimony concerning gasoline in the primer was a play on words, as appellant's specifications for the primer admittedly called for an inherently dangerous product with the equivalent of gasoline as its solvent. The effect of these two lines of evidence was simply to create an issue of fact for the jury.

In the examples just cited, as elsewhere in its brief, appellant is relying upon the version of the facts most favorable to it and is wholly disregarding the conflicting evidence favorable to appellee which created the issues of fact properly submitted to the jury.

At page 29 of its brief appellant asserts that plaintiff's theory was entirely upon the basis that the primer contained gasoline. Nothing could be further from the truth. Our experts simply identified certain of the contents of the primer as being substantially gasoline. Our position was and is that, irrespective of the name by which it is called, the primer as manufactured according to appellant's own specifications was an inherently dangerous and hazardous material as to which the buying public was entitled to be adequately warned. We identified a portion of the primer as gasoline only to dramatize for the lay persons on the jury the dangerous nature of this material.

Overall, appellant's theory on the subject of contributory negligence is that Mr. Segerstrom's employees knew that it was dangerous to heat the ma-

terial inside a building. The evidence on this subject is directly to the contrary. None of the employees was aware of the dangerous characteristics of this material which resulted in the disastrous explosion.

This case is comparable to the kerosene cases, in which it has repeatedly been held that it is not contributory negligence as a matter of law to use kerosene to kindle fires inside buildings.

Ellis vs. Republic Oil Co. (Iowa), 110 N.W. 20;

Chapman vs. Deep Rock Oil Co. (Ill.), 77 N.E. (2d) 883;

Douglas vs. Daniel Bros. Oil Co. (Ohio), 22 N.E. (2d) 195;

Frazier vs. Ayres (La.), 20 So. (2d) 754, 761;

Waters-Pierce Oil Co. vs. Deselms, 212 U.S. 159, 53 L. ed. 453.

Also appellant asserts, as we understand it, that the proximate cause of the disaster was the action of the crew in heating the material. If this were the case, no manufacturer could ever be held liable for a failure to affix warning labels, as the damage is always brought about by the subsequent act of some member of the public which, viewed in retrospect, can be characterized as foolhardy or careless. The truly proximate cause of this disaster was the failure of appellant to affix warning labels in accordance with its duty. Could anyone doubt that, had there been such a warning label on these barrels, this property loss would not have occurred? In any event, the issue of proximate cause and also the issue of contributory negligence were clearly for the jury.

3. Appellant's Contention as to the Instruction Dealing with §70.74.300 of the Revised Code of Washington (App. Br. pp. 31-44).

Appellant lodges the following complaints against the instruction in question: (a) The Court should have interpreted the statute for the jury, the interpretation of the statute being a matter for the Court and not for the jury; (b) this being a criminal statute it is to be strictly construed and not extended beyond its plain terms; (c) under the rule of *ejusdem generis* a roof or paint primer or coating is not within the terms of the statute; (d) the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings. Before discussing these four contentions, we again point out that no one of these contentions was stated to the trial Judge in support of the exception taken to this instruction at the close of the trial (Tr. 316-318). It is well settled that only such reasons as are stated in taking exception to instructions in the trial Court can be urged on appeal.

Capital Transit Co. vs. Compton (8th C.A.), 187 Fed. (2d) 844, 847;

W. T. Grant Co. vs. Karren (10th C.A.), 190 Fed. (2d) 710, 712.

Rule 51 of the Federal Rules of Civil Procedure in part provides:

"No party may assign as error, the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Without waiving the foregoing, we will now discuss each of the above objections separately.

a. STATUTORY INTERPRETATION FOR THE COURT
(App. Br. pp. 32-34).

We quite agree with appellant that the interpretation of ambiguous statutes is for the Court. However, there is no ambiguity about this statute. It is obvious, even to a lay person, that the language "or other explosive or combustible substance" refers only to other substances equally as hazardous as benzine, gasoline, naphtha, nitroglycerine, dynamite or powder. Furthermore, that is the sole basis upon which the statute was argued to the jury by appellee's counsel. The evidentiary basis for this instruction was the testimony of the expert witnesses that this entire primer was more dangerous than straight naphtha, and equally as subject to flash fire or explosion as gasoline when above its flash point, naphtha and gasoline being two of the specifically named substances required by the statute to be labeled "Explosive." Our entire argument on the subject to the jury was to the effect that the primer was required to be labeled because in its entirety it was more dangerous than naphtha, and equally as hazardous as gasoline on warm days. We at no time contended to the jury that because the primer may have contained percentages of gasoline or naphtha it was within the statute.

Appellant's present argument was first urged upon the trial Court at the hearing on the motion for new trial. In denying the motion, the Court recognized

what we have said as to the nature of our argument to the jury, where the Court said,

“And if I had it to do over again — of course hindsight is always better than foresight or one’s judgment during the heat and rush of a jury trial — I would have instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn’t do so because the question didn’t seem to be raised or the jury misled as to the application of the statute.” (Tr. 325).

Elsewhere, appellant suggests that its counsel were “surprised and disappointed” at the giving of this instruction. We are unable to account for their surprise. Our contention that this primer should have been labeled in accordance with the provision of R.C.W. 70.74.300 was embraced in the pre-trial order (Tr. 21). The pre-trial order was entered April 1, 1954 and the trial of the case did not commence until April 26, 1954. Early in the trial, we submitted to the Court our requested instructions, among which was the instruction in question. During the forenoon of May 7, 1954, the trial judge advised counsel that he was going to give the requested instruction on the statute (Tr. 291-296). In the afternoon, there was further lengthy discussion between Court and counsel on other legal matters, followed by arguments to the jury, and it was not until late afternoon of May

because he hadn't seen anything on the barrels or any instructions to that effect (Tr. 73). He further specifically testified, "Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did" (Tr. 87).

We submit that the evidence most strongly supports the jury's finding of negligence on the part of appellant in failing to warn and also on the issue of proximate causation, and certainly the evidence was sufficient to carry these questions to the jury.

2. Alleged Contributory Negligence.

The record in this case is absolutely devoid of any evidence that either Mr. Segerstrom or Foreman Rosenbaum or any member of the crew knew of any danger that this product, while being heated in the fashion pursued, might cause an explosion or any fire which might communicate to and damage or destroy the building. Unquestionably Rosenbaum and others of the crew knew that the material might burn on direct contact with a fire, but their testimony is that they only considered that small flames might result, falling far short of the ceiling of the room and nowhere near the walls (Tr. 73, 84-85, 86). It should be remembered that the floor of this huge room was concrete, the entire floor area was empty, the nearest wooden wall was 25 feet from the stove, and the ceiling was 18 feet above the floor (Ex. 20, Tr. 72, 74). The majority of the large outside doors were open (Tr. 73).

Mr. Segerstrom testified that he thought the material he was purchasing was "Liquid Asbestos," that he had no knowledge that it was a petroleum product and that he had no knowledge whatever that it was dangerous in any respect (Tr. 61-62). That Mr. Segerstrom thought the material was "Liquid Asbestos" and fireproof is understandable. This manufacturer, for the purpose of influencing the public to buy its product, called it "Liquid Asbestos Roof Coating" obviously for the purpose of creating the impression that it was fireproof. In furtherance of that design, it incorporated in its instruction booklet an indirect, false representation that it was fireproof where it stated that the only consequences of heating the material would be to damage the water-proofing qualities.

Segerstrom also, on reading the instruction booklet, noted that it purported only to be "Instructions for applying Battleship Asbestos Roof Coating." Nowhere did the booklet purport to be instructions for applying the roof primer, and there were no instructions as to the roof primer in the booklet. In fact, the only reference to the roof primer throughout the booklet was a suggestion that under certain circumstances it would be advisable to use a priming coat. Therefore, Mr. Segerstrom was correct in informing Mr. Rosenbaum that he had received no instructions as to the primer.

Foreman Rosenbaum searched the barrels for any instructions or warning on the labels and found none (Tr. 67, 70, 73). Before determining to heat the

primer over the applewood coals he placed the materials for an entire day in the direct rays of a hot sun and was still faced with the necessity of further thinning the material in some manner (Tr. 68-70). He had no knowledge that the material was subject to emitting explosive vapors and only thought that it might burn with flames of small proportions upon direct contact with fire (Tr. 71). To guard against this, he directed that the fire be permitted to burn down to coals before the buckets of the material were placed over it and also directed that precautions be taken against spilling any of the material, both of which things were done by the crew (Tr. 72, 90-91, 94). He had therefore taken all necessary and reasonable precautions against any danger known to him. He further testified that had he known the material was subject to giving off explosive vapors or had there been a warning on the barrels, he would not have heated the material in the manner followed (Tr. 87). Rosenbaum categorically testified that he did not realize that there was any danger connected with what was being done (Tr. 73, 86-87).

Tom Woods, the only member of the crew having anything to do with the heating of the primer, testified that he had only an 8th grade education and had no knowledge or experience as to petroleum or asphalt, that he would not have participated in the heating of the primer if he had known that it was giving off gas vapors, that he detected nothing other than a tar smell, and that he did not at the time consider that there was any danger (Tr. 92-93).

Neither Mr. Segerstrom nor any member of the crew had any special knowledge of this type of material. The name "Battleship Primer" on the barrel gave no clue as to the character of the contents of the barrel, nor was there any tell-tale odor (Tr. 74). Had the labels even so much as informed the men that the material contained gasoline or benzine or naphtha, they would doubtless not have heated it, as such names are understood by laymen as connoting danger. On the contrary, the term "Primer" is wholly innocuous.

Mr. Rosenbaum had seen professional crews heating roofing tars in and about buildings under construction or repair, and all of us have seen the same thing countless times. He stated that that was where he got the idea as to the heating method (Tr. 70, 86). The knowledge that Mr. Rosenbaum and other ordinary laymen do not have is that the tars being heated by professional roofers are so-called "Hot Roofing," having flash points in the neighborhood of 450° to 500° F. and therefore safe to heat up to those high temperatures (Tr. 177, 149-150). As with Mr. Rosenbaum, the ordinary layman does not know that so-called "Cold Roofings" such as the Battleship products, are vastly different and contain highly volatile and dangerous solvents.

We venture to say that anyone of us, including the members of this Court, possessed of no more technical knowledge than Mr. Rosenbaum, would have thought that there was no danger in heating this material in the fashion employed by these men, in view of the

vastness of the room in which it was being conducted and the concrete floor therein. It is of some significance that, when appellant's expert witness Erickson undertook to simulate the method followed in heating this primer, and for that purpose constructed a similar barrel stove and built similar fires in it, he did so inside a building and within 15 feet of wooden walls (Tr. 183, Ex. 47, 48). It will be said that Mr. Erickson only had water in the buckets over his fire, but Mr. Rosenbaum and his crew had no knowledge that the material they were heating was any more dangerous than water.

The law is clear that an essential element of contributory negligence is *an appreciation of the danger*; knowledge of the physical characteristics of a material, such as knowledge that it is a petroleum product, is not enough.

38 Am. Jur. 864, Negligence §188;

38 Am. Jur. 1067-8, Negligence §358;

Heinlen vs. Martin Miller Orchards, 40 Wash. (2d) 356, 360; 242 Pac. (2d) 1054.

We fail to see any basis in the evidence for any claim that Mr. Segerstrom or his employees had any reason to believe there was any danger in the heating of this primer by the method employed, and in any event the issue was for the jury and was left to the jury by the District Judge. *They did not know of the danger because they were laymen and unskilled workers; and they had not been warned of the danger by appellant.*

ARGUMENT IN ANSWER TO APPELLANT

1. The Contention that There Was No Primary Negligence (App. Br. pp. 16-20).

Appellant first suggests that the primer was designed for use on the exterior of buildings, that appellant did not intend that it should be heated inside of a building and that appellant is not liable where it was used in a manner other than intended by the manufacturer. This argument is without validity. In 46 Am. Jur. 941 it is said,

“That the manufacturer does not intend that the article shall be used in a certain way will not relieve him from liability for injuries to one attempting so to use it, if, from the directions upon the package, a person of ordinary intelligence could conclude that it might be so used.”

Appellant next suggests (App. Br. p. 17) that large quantities of this material have been sold and used by the public without harm or disaster. In the first place there is no such showing in the evidence. The only evidence on the subject was the testimony of appellant's secretary and chief accounting officer, George Billingsley, that no claim on the part of any user had ever come to his attention; but he conceded on cross-examination that small claims would not come to his attention and that he would only hear about important claims, such as the one here involved (Tr. 264-265). Secondly, the mere fact that appellant com-

pany had managed to escape liability in the past is of no controlling consequence.

Thornhill vs. Carpenter-Morton Co. (Mass.),
108 N.E. 474, 491.

Appellant suggests (App. Br. p. 17) that Mr. Segerstrom and his employees ignored warnings. We are unable to understand by what license appellant claims that there was any warning. Surely it does not contend that the language on page 3 of the instruction booklet constituted a warning of danger. It would be monstrous if industry was permitted to absolve itself of its duty to warn by language such as was employed by appellant in its instruction booklet.

The balance of appellant's argument under this contention consists of a discussion of five cases, none of which have any similarity with the facts here involved. The following are cases with similar facts where manufacturers have been held liable for damages through explosion and fire caused by similar products, because they failed to affix warning labels.

Genessee County Assoc. vs. Sonneborn
(N.Y.), 189 N.E. 551;

Thornhill vs. Carpenter-Morton Co. (Mass.),
108 N.E. 474;

Standard Oil Co. vs. Lyons (8th C.A.), 130
Fed. (2d) 965;

Alligator Co. vs. Dutton (8th C.A.), 109 Fed.
(2d) 900;

Frazier vs. Ayres (La.), 20 So. (2d) 754.

2. Appellant's Contention as to Contributory Negligence (App. Br. pp. 21-31).

Typical of appellant's entire brief are the erroneous statements made in the course of the argument as to this contention.

On page 21 of appellant's brief it is said,

"Plaintiff stored this primer for more than three months (from April 1 to July 8, 1953) in an insulated cold storage room, whereby the primer lost its normal fluidity."

The evidence by all witnesses is that there was no refrigeration in the building during this period, that the temperature in the room had long since normalized with the average outdoor temperature, and on July 8, 1953 the temperature of the primer in the room would have been at least 65° F. (Tr. 143-144, 213-214). Appellant also overlooks the evidence that the primer was left in the direct rays of the sun for the entire day of July 7, 1953 when the outside temperature was 90° F. Appellant also overlooks the testimony that the primer had lost its normal fluidity because it had jelled in the barrel, a tendency known to exist in this type of material (Tr. 232, 254). Appellant's vice-president, Ralph Uhrmacher, conceded that the primer remaining after the fire was too thick and that it could have been in that condition when received by Segerstrom (Tr. 203, 232).

Appellant also at page 21 of its brief reiterates its claim that the instruction circular warned against heating appellant's product. There was no such warning.

At page 23 of its brief, appellant reiterates that, during the noon hour, more applewood was fed into the drum. The testimony of Tom Woods and Elwood Rosenbaum was directly to the contrary, that no fuel was added during the noon hour and that there were only coals after lunch (Tr. 91, 97).

At pages 29-30 appellant asserts the claim that the substance equivalent to gasoline, which was determined to be in the primer by the experts who tested the barrel remaining after the fire, was not in it when manufactured, and appellant points to its evidence purporting to show that there was no possibility of gasoline getting into the primer during its manufacture. Appellant conveniently overlooks appellee's evidence which showed just as positively that no foreign substance could have gotten into the barrel of primer while it was in appellee's possession (Tr. 74-75, 82, 108, 120, 135-136, 285). It should be borne in mind that it was stipulated that the barrels of primer received by Mr. Segerstrom were the uniform product of appellant company (Tr. 19, 103-104). Contrary to appellant's contention here, its Mr. Uhrmacher admitted that gasoline might have been used as the solvent in manufacturing the primer according to the specifications (Tr. 228); and, according to other witnesses, safer solvents could also have been used but at greater cost (Tr. 141). Also, the Standard Oil Co. representative, Mr. Schauer, testified in substance that the equivalent of gasoline was used as the solvent in manufacturing the primer (Tr. 250-258). Appellant's chemists only checked one out of four of the shipments of this primer received from Standard Oil

Co. (Tr. 278). Appellant's chemist, Ralph Uhrmacher, ran complete tests on the primer remaining after the fire, and the only difference he detected from appellant's uniform product was a much greater viscosity (Tr. 217). Furthermore, all of the testimony concerning gasoline in the primer was a play on words, as appellant's specifications for the primer admittedly called for an inherently dangerous product with the equivalent of gasoline as its solvent. The effect of these two lines of evidence was simply to create an issue of fact for the jury.

In the examples just cited, as elsewhere in its brief, appellant is relying upon the version of the facts most favorable to it and is wholly disregarding the conflicting evidence favorable to appellee which created the issues of fact properly submitted to the jury.

At page 29 of its brief appellant asserts that plaintiff's theory was entirely upon the basis that the primer contained gasoline. Nothing could be further from the truth. Our experts simply identified certain of the contents of the primer as being substantially gasoline. Our position was and is that, irrespective of the name by which it is called, the primer as manufactured according to appellant's own specifications was an inherently dangerous and hazardous material as to which the buying public was entitled to be adequately warned. We identified a portion of the primer as gasoline only to dramatize for the lay persons on the jury the dangerous nature of this material.

Overall, appellant's theory on the subject of contributory negligence is that Mr. Segerstrom's employees knew that it was dangerous to heat the ma-

terial inside a building. The evidence on this subject is directly to the contrary. None of the employees was aware of the dangerous characteristics of this material which resulted in the disastrous explosion.

This case is comparable to the kerosene cases, in which it has repeatedly been held that it is not contributory negligence as a matter of law to use kerosene to kindle fires inside buildings.

Ellis vs. Republic Oil Co. (Iowa), 110 N.W. 20;

Chapman vs. Deep Rock Oil Co. (Ill.), 77 N.E. (2d) 883;

Douglas vs. Daniel Bros. Oil Co. (Ohio), 22 N.E. (2d) 195;

Frazier vs. Ayres (La.), 20 So. (2d) 754, 761;

Waters-Pierce Oil Co. vs. Deselms, 212 U.S. 159, 53 L. ed. 453.

Also appellant asserts, as we understand it, that the proximate cause of the disaster was the action of the crew in heating the material. If this were the case, no manufacturer could ever be held liable for a failure to affix warning labels, as the damage is always brought about by the subsequent act of some member of the public which, viewed in retrospect, can be characterized as foolhardy or careless. The truly proximate cause of this disaster was the failure of appellant to affix warning labels in accordance with its duty. Could anyone doubt that, had there been such a warning label on these barrels, this property loss would not have occurred? In any event, the issue of proximate cause and also the issue of contributory negligence were clearly for the jury.

3. Appellant's Contention as to the Instruction Dealing with §70.74.300 of the Revised Code of Washington (App. Br. pp. 31-44).

Appellant lodges the following complaints against the instruction in question: (a) The Court should have interpreted the statute for the jury, the interpretation of the statute being a matter for the Court and not for the jury; (b) this being a criminal statute it is to be strictly construed and not extended beyond its plain terms; (c) under the rule of *ejusdem generis* a roof or paint primer or coating is not within the terms of the statute; (d) the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings. Before discussing these four contentions, we again point out that no one of these contentions was stated to the trial Judge in support of the exception taken to this instruction at the close of the trial (Tr. 316-318). It is well settled that only such reasons as are stated in taking exception to instructions in the trial Court can be urged on appeal.

Capital Transit Co. vs. Compton (8th C.A.),
187 Fed. (2d) 844, 847;

W. T. Grant Co. vs. Karren (10th C.A.), 190
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Without waiving the foregoing, we will now discuss each of the above objections separately.

a. STATUTORY INTERPRETATION FOR THE COURT
(App. Br. pp. 32-34).

We quite agree with appellant that the interpretation of ambiguous statutes is for the Court. However, there is no ambiguity about this statute. It is obvious, even to a lay person, that the language "or other explosive or combustible substance" refers only to other substances equally as hazardous as benzine, gasoline, naphtha, nitroglycerine, dynamite or powder. Furthermore, that is the sole basis upon which the statute was argued to the jury by appellee's counsel. The evidentiary basis for this instruction was the testimony of the expert witnesses that this entire primer was more dangerous than straight naphtha, and equally as subject to flash fire or explosion as gasoline when above its flash point, naphtha and gasoline being two of the specifically named substances required by the statute to be labeled "Explosive." Our entire argument on the subject to the jury was to the effect that the primer was required to be labeled because in its entirety it was more dangerous than naphtha, and equally as hazardous as gasoline on warm days. We at no time contended to the jury that because the primer may have contained percentages of gasoline or naphtha it was within the statute.

Appellant's present argument was first urged upon the trial Court at the hearing on the motion for new trial. In denying the motion, the Court recognized

what we have said as to the nature of our argument to the jury, where the Court said,

“And if I had it to do over again — of course hindsight is always better than foresight or one’s judgment during the heat and rush of a jury trial — I would have instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn’t do so because the question didn’t seem to be raised or the jury misled as to the application of the statute.” (Tr. 325).

Elsewhere, appellant suggests that its counsel were “surprised and disappointed” at the giving of this instruction. We are unable to account for their surprise. Our contention that this primer should have been labeled in accordance with the provision of R.C.W. 70.74.300 was embraced in the pre-trial order (Tr. 21). The pre-trial order was entered April 1, 1954 and the trial of the case did not commence until April 26, 1954. Early in the trial, we submitted to the Court our requested instructions, among which was the instruction in question. During the forenoon of May 7, 1954, the trial judge advised counsel that he was going to give the requested instruction on the statute (Tr. 291-296). In the afternoon, there was further lengthy discussion between Court and counsel on other legal matters, followed by arguments to the jury, and it was not until late afternoon of May

7th that the Court instructed the jury (Tr. 296). Appellant had ample opportunity to do so, but requested no instruction of the Court interpreting this statute as it now contends the Court should have done. Furthermore, appellant had ample opportunity to conceive the idea that the statute needed interpreting so as to embody that reason in its exception to the instruction. The fact that appellant did not, in excepting to the instruction, suggest that it should have been interpreted, clearly indicates that its counsel did not then consider that any interpretation was needed, in view of the argument to the jury. We reiterate that this position is an afterthought, wholly lacking in merit.

b. RULE OF STRICT CONSTRUCTION (App. Br. pp. 34-35).

We agree with what appellant has to say here, but we fail to see how the rule of strict construction has any application. Again, the rule only applies in the construction of ambiguous statutes.

c. APPELLANT'S CONTENTION AS TO THE RULE OF *EJUSDEM GENERIS* (App. Br. pp. 35-41).

We likewise agree with appellant's statement as to the rule of *ejusdem generis* and its application to this statute. What we have already said answers the argument at this point. Our argument to the jury as to the statute was upon the basis required by the rule of *ejusdem generis*, the jury was not misled and appellant made no mention of this rule in stating its reasons for its exception to the instruction.

We have read with interest what appellant has to say as to the great changes which have taken place in the petroleum industry, but we do not understand that benzine, gasoline or naphtha have become any less dangerous through the years or that the reasons why the buying public needs to be warned of the hidden presence of these or similar substances within containers is any less compelling now than when this statute was enacted. Appellant asks why kerosene was not included by the legislature in the substances required to be labeled. The reason, of course, is that kerosene is relatively safe, having flash points above 50° F. (Tr. 140, Ex. 27).

We quite agree that nowadays a container labeled "Gasoline" would be known to anyone to be dangerous, but we fail to see how that has anything to do with the situation as to a container labeled "Primer." Our whole position was and is that this primer is of the same nature and at least equally as dangerous as naphtha and gasoline at normally experienced temperatures and, under the rule of *ejusdem generis*, is therefore within the statute.

- d. THE CONTENTION THAT THE STATUTE HAS NEVER BEEN TREATED BY THE LAW ENFORCEMENT OFFICERS OF THE STATE AS APPLICABLE TO ROOF PRIMERS (App. Br. pp. 40-44).

Basically appellant relies at this point upon the off-hand observation of the trial Judge that this statute is perhaps obsolete. There is no basis in the evidence or in any authority for such a conclusion. The stat-

ute has been included in all codifications of the Washington statute, including the Revised Code of 1951. The authority for the 1951 codification is to be found in §1.08.015 of the Revised Code of Washington, and in that section the revisor was charged with the duty to "(m) Strike provisions manifestly obsolete." Notwithstanding that legislative directive to the codifier, this statute was embraced within the code.

There is no validity in the argument that the statute is not enforced or observed. First of all, there is no evidence to that effect. Also, we take the liberty of going outside the record, as has appellant, to state our knowledge that the statute is observed by reputable manufacturers. We do not know upon what basis appellant is able to state that neither the Attorney General nor any of the 39 County Prosecutors have ever considered that this statute covered commercial products such as roof primers. We are quite certain that appellant's counsel has not undertaken the staggering task of reviewing the files of the 39 County Prosecutors and the Attorney General for the past 45 years. Likewise, we fail to see the significance in the fact, if it is a fact, that the Attorney General has never been called upon to construe or give an opinion concerning the statute, nor do we see the significance of the fact that the Supreme Court of Washington has not been called upon to construe this statute, as there may be countless cases which have never been appealed.

Appellant also suggests that we were unable to discover a single can of roof coating, primer, paint or

similar product that had ever been labeled in compliance with this statute. We do not know on what basis appellant has reached the conclusion that we made any effort to do so, which we did not. We did, however, quickly obtain in the Spokane market the roofing products of 4 reputable manufacturers, all of which contained true warnings equally as effective as the term, "Explosive," and represented a *de facto* compliance, at least, with the public policy of this state as expressed in the statute.

We submit that the statute in question was applicable and that the Court properly submitted to the jury for determination whether this primer, because of the testimony that it was more dangerous than naphtha, and as dangerous as gasoline, was a substance required to be labeled in accordance with the statute. In fact, we could justifiably contend that the Court should have ruled as a matter of law that the primer was required to be labeled "Explosive." There was no conflict in the evidence. It was conceded that the primer had a flash point between 80° and 100° F., which was within the range of naphtha.

CONCLUSION

We respectfully urge the Court to refer to and review the entire record in this case rather than to rely upon appellant's statements as to the evidence. We believe that it will be manifest to the Court, upon so doing, that appellant was grossly negligent and

totally oblivious to the safety of the public in failing to affix warning labels to this product. We think it will be equally obvious from the sales literature of appellant, which is among the exhibits, that its failure to so warn the public was coldly calculated so as to not adversely affect the saleability of its product and to create the false impression that its product was fireproof. We further believe that it is most evident that, had appellant placed a warning label on the barrels, this litigation would never have arisen, for there would have been no explosion and fire. In any event, we submit that the issues were for the jury and that the judgment should be affirmed.

Respectfully submitted,

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No. 14521

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United States
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poration,

Appellant,

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N. Segerstrom,

Appellee.

NO. 14521

Appellant's Reply Brief

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States, for the Eastern District of Washington*

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PAUL P. O'BRIEN,
CLERK

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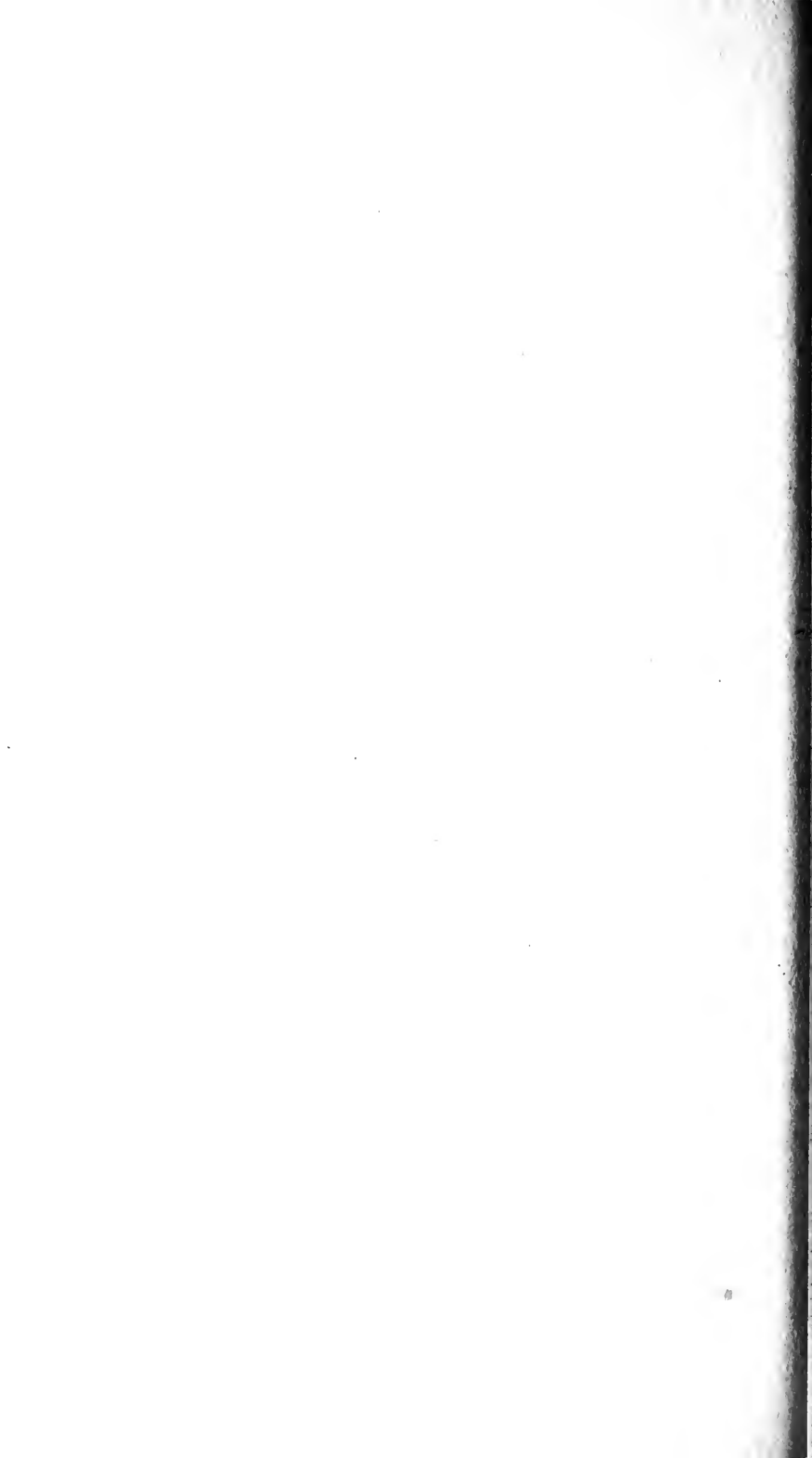
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AUTHORITIES CITED

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ERRATA TO APPELLANT'S BRIEF

p. 3—Third: Reference to “defendant’s employees” should be “plaintiff’s employees.”

p. 14—I: Reference to “plaintiff’s Motion” should be “defendant’s Motion.”

p. 20—last paragraph: Reference to “defendant” should be “plaintiff.”

EVIDENCE

Appellant does not question the rule that in determining whether there was evidence of negligence on the part of appellant and whether appellee was contributorily negligent as a matter of law, the evidence must be viewed in the light most favorable to appellee (Br. 2). However, this rule does not give appellee license to disregard undisputed facts or to draw unreasonable inferences from the testimony.

The basic undisputed facts are:

(1) That the plaintiff purchased defendant's roofing compound, both primer and final coat, at one time and in connection with this purchase plaintiff received a pamphlet of instructions which clearly stated "Do not heat or thin Battleship" (Br. 4).

(2) That after plaintiff had stored the roofing compound for more than three months, he directed his employees to apply it to the roof of his warehouse (Br. 6).

(3) That when his employees started to use it, they found it too thick to apply readily (Br. 6).

(4) That plaintiff's foreman called plaintiff and asked if there were any directions or instructions for applying the primer and plaintiff advised him there were no instructions (R. 61, 68, 77; Br. 25). Plaintiff ignores this fact in his statement of the case.

(5) That plaintiff's foreman thereafter rigged up a crude stove and commenced heating the roofing compound in pails set on the stove (R. 70, 71, 72, 78, 88, 89; Br. 7).

(6) That the stove was placed inside a room in the warehouse and after approximately one-half day's operation, the gases and fumes which had collected in the warehouse exploded, setting the warehouse on fire and destroying it (Br. 7, 8).

(7) That plaintiff's workmen would not have heated this product had they been supplied with the instruction pamphlet which was in plaintiff's possession (R. 80, 81).

(8) That plaintiff's foreman knew from the smell that this was a petroleum product (R. 80).

While there are also numerous minor conflicts as to what inferences can be drawn from the record, we do not wish to unduly lengthen this brief by repeating our contentions as set out in our opening brief. However, there is one matter which has been confused in appellee's brief to such an extent that we feel it needs further clarification, and that is the contention of appellee that appellant knew that this material sometimes jelled in the barrel (Br. 12, 21).

Appellee's contention that appellant knew that this material sometimes jelled in the barrel is derived from:

(1) The fact that the material used in plaintiff's experiments was thick and jelled.

(2) Testimony by Ralph Uhrmacher on pages 203 and 232 of the record. The testimony of Mr. Uhrmacher was that any jelling in the barrel was rare and very slight and in his experience the material had never gotten to a condition where you couldn't put it on as it came from the barrel (R. 232). Mr. Uhrmacher's candor in admitting that it is *possible* that the particular material was thick when opened since he could not know all the conditions at the time, including temperature conditions, is a far cry from the implications drawn by appellee.

(3) Testimony of Homer Schauer that this type of product tended to jell when it was thinned or diluted with gasoline and that this material is diluted with what amounts to gasoline. To reach this result appellee has taken statements out of context and twisted their meaning into a wholly unreasonable conclusion. While Mr. Schauer did testify that gasoline could be made out of the solvent used in this material which comes from the second still in the refinery, gasoline is generally made out of the product of the first still (R. 250, 251). The cause of the jelling was given as the presence of the light components in gasoline, like butane or pentanes (R. 254). These light gases are taken off in the first still (R. 250; Br. 19). The solvent for this material comes from the second still.

The only reasonable inference that can be drawn

from this testimony is that gasoline (motor fuel) was added to the sample used by appellee in his tests. Where, when, or how this was added is left to conjecture. The jury, of course, could disregard this evidence or draw any reasonable inference from it but it could not draw an inference that appellant knew that its product tended to jell so that it had to be heated or thinned as claimed by appellee (Br. 14, 21).

ARGUMENT

Appellee's brief is for the most part directed to an issue not involved in this case. Most of his arguments and citations would be more in point had one of the plaintiff's workmen or some third party been injured and been suing for his damages, or had appellee purchased this material from a retailer who had forgotten to pass the instruction pamphlet on to the consumer. *In this case the plaintiff himself received the instruction pamphlet.* The fact that the instructions not to heat Battleship were not pasted on the can, while relevant in an action by one other than this plaintiff, should have no relevancy here.

Whether it should be considered that the plaintiff was grossly negligent in not passing the instruction pamphlet on to his foreman or whether it is assumed in law that the knowledge of the master has been communicated to his servant in a case where the master's rights against a third party are involved, the result is the same. *It is an undisputed fact that had the plaintiff either voluntarily, or in response to*

a request by his foreman, supplied his workmen with the instruction book, the accident would not have happened!

Had this foreman been injured in the fire and had he sued his employer for his injuries, could there be any doubt that the employer would have been held negligent as a matter of law and that the only issue in such case would have been the contributory negligence of the employee? His duty of care toward his property in this case should not be substantially different from his duty toward his employee.

Plaintiff tries to avoid the logical result of these facts by claiming that the plaintiff thought the instructions applied only to the final coat and not to the primer. This contention does not rise to the dignity of evidence. He received one shipment of roofing compound—he received one instruction pamphlet. To split hairs and say he thought it applied only to the final coat and had nothing to do with the first coat and on such a basis tell his foreman simply that there were “no instructions” is too unreasonable to consider. If in fact he knew he had this pamphlet when his foreman called, as his testimony and his contentions in his brief imply, then he was wilfully and wantonly negligent in failing and refusing to advise his foreman that he had this pamphlet and refusing to supply it to him (Br. 25).

Appellee’s contention apparently is that when a manufacturer ships products to a man in the orchard

business, who lives in the immediate vicinity of his business establishment, he is no more likely to and has no greater duty to pass these instructions on to his workmen than the President of the United States has to pass on such instructions to some remote activity of the federal government (Br. 23). The comparison is absurd. Appellee was in direct charge of the business and should not be permitted to brush off his responsibility in such a cavalier manner.

Appellee's citations of authority also ignore this basic factual situation. He cites the *Restatement of Torts* § 397, p. 1082 (Comment b) (Br. 18). Comment b, which refers back to § 388, Comment 1, obviously applies to the duty owed by the manufacturer to a third person and contemplates an injury to the rights of such third person. It has no application to this case where the rights and duties between the manufacturer and his immediate vendee only are involved. Please see

Restatement of the Law of Torts, § 388, p. 1049 (Comment 1).

In nearly every case cited by appellee as authority, the material in question was being used in an ordinary and anticipated manner.

Appellee's principal authority appears to be *Standard Oil Co. vs. Lyons* (8th C.A.), 130 Fed. (2d) 965 (Br. 19, 20). In this case the plaintiff had used the material in a normal manner. There was no direct vio-

lation of instructions as in the instant case. The same is true of the cases of *Genessee County Relief Assn. vs. Sonneborn*, 263 N. Y. 463, 189 N.E. 551, *Thornhill vs. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474, and *Frazier vs. Ayers* (La. Unpublished App.), 20 So. (2d) 754, (Br. 21, 30).

We will not attempt to analyze each of appellee's authorities except to note that none is at all close to the present case in its factual situation. In only two cases cited had the plaintiff violated instructions and been allowed to recover.

(1) *Fidelity Trust Co. vs. Wisconsin Iron Works*, 145 Wis. 385, 129 N.W. 615, 618. This case was a master and servant case and involved the duty of care owed the servant by his master. The master was running a deadly poison through a hose which usually had water coming out of it and the employer knew that his employees were accustomed to drink out of it. Any normal person would expect very extraordinary measures to be taken under those circumstances to protect the employees. This case in no wise resembles the present problem.

(2) *McClanahan vs. California Spray Co.*, 194 Va. 842, 75 S. E. (2d) 712. This is the only case that seems, at least at first blush, to be similar in any way to the present case. The defendant manufactured and distributed a fungicidal spray for the control of apple scab. The instructions directed that it be used not later than petal fall. The plaintiff used it later than

petal fall and his orchard was severely damaged. The opinion is long and involved. The court held that the plaintiff could recover but to reach that result it analyzed at great length a statute on labeling and reviewed its history and purpose (75 S.E. (2d) at 721, 722). The court points out that the application of the fungicide at a later time was not the proximate cause of the damage (75 S.E. (2d) 722, 723). The court further finds that the plaintiff followed generally-recognized safe practices in the area (75 S.E. (2d) at p. 724). Finally both the court and the concurring Justices point out that *representatives of the defendant were in the orchard while the spray was being applied and they made no objection or protest and gave no indication that the spray was being improperly used!* (75 S.E. (2d) at 725, 726).

Without limiting our contentions as set forth in our opening brief, we respectfully submit that, at the very least, where a manufacturer has sold a product such as this directly to a consumer with instructions not to heat, he has no reason to anticipate that the consumer will heat the material in violation of the instructions, and further that when the consumer does violate the instructions or fails to give the instructions to his workmen working directly under him, such failure is negligence and is a proximate cause of any injury resulting from the failure to pass on these instructions as a matter of law.

In answering appellant's arguments directed to Specifications of Error III and V, appellee opens his

argument (Br. p. 13, 14) with an attack on the adequacy of appellant's objections to the submission to the jury of Sec. 70.74.300 RCW. Appellee returns a second time to this objection at p. 35 of his brief, where he cites in support of his position *Capital Transit Co. vs. Compton*, 187 Fed. (2d) 844, and *W. T. Grant Co. vs. Karren*, 190 Fed. (2d) 710. Neither of these cases lend the slightest support to appellee's position. In the *Compton* case, appellant offered only one criticism to the judge's charge to the jury, on a point not involved in the appeal. In the *Karren* case, no objection was taken to the challenged instruction on the one ground where it was vulnerable to criticism.

In both cases, then, there was a complete failure to make any objection relevant to any fault in the instruction. In our case, on the contrary, it will be observed that all four of our specific objections centered on the obsolete and limited nature of this statute, and the basic objection we then made that roof primer "is not within the statutory definition" opened wide the door to the analysis to which we have subjected the use of this statute by appellee in our brief, which is a mere elaboration of our trial objections.

It will further be borne in mind that this instruction was submitted by the appellee as the principal support of its contention that appellant was negligent. Since appellant submitted these four specific objections to this instruction, there must be some limit to the burden appellee would impose on appellant to protect him from his own misconception of the law.

Passing, now, to appellee's answer to the merits of our argument attacking the submission of this statute to the jury, we are gratified, but not surprised, that appellee is constrained to admit that this criminal statute must be strictly construed, that the rule of *ejusdem generis* must be applied to it, and that the interpretation of this statute is for the court, not for the jury.

On this last point, appellee seeks to excuse the trial judge's submission of the statute to the jury without any interpretation or explanation as to its limited scope or meaning, by saying that the proof showed that roof primer is "more dangerous than straight naphtha and equally as hazardous as gasoline." Appellee further concedes, as he must, that the statutory language, "or other explosive or combustible substance" refers only to substances equally as hazardous as "benzine, gasoline, naphtha, nitroglycerine, dynamite or powder" and of the same general kind.

But these concessions by appellee destroy his argument. The trial court did not give this, or any restricted, meaning to the statute. He did not tell the jury that, before they could apply the statute, they must find that the roof primer is as explosive as gasoline or naphtha, and must be the same general kind or explosive. He did not tell them that this was a criminal statute, to be strictly construed. On the contrary, he left it to the jury to suppose that *any* combustible substance must be labelled. That is just what the statute would seem to mean to the lay mind, unless its lan-

guage was carefully restricted by appropriate definition and limitation. It comes too late for appellee now to concede these limitations. He should have incorporated them in his requested instructions. Thus, by appellee's own concessions, this instruction is gravely misleading and faulty, and should never have been given.

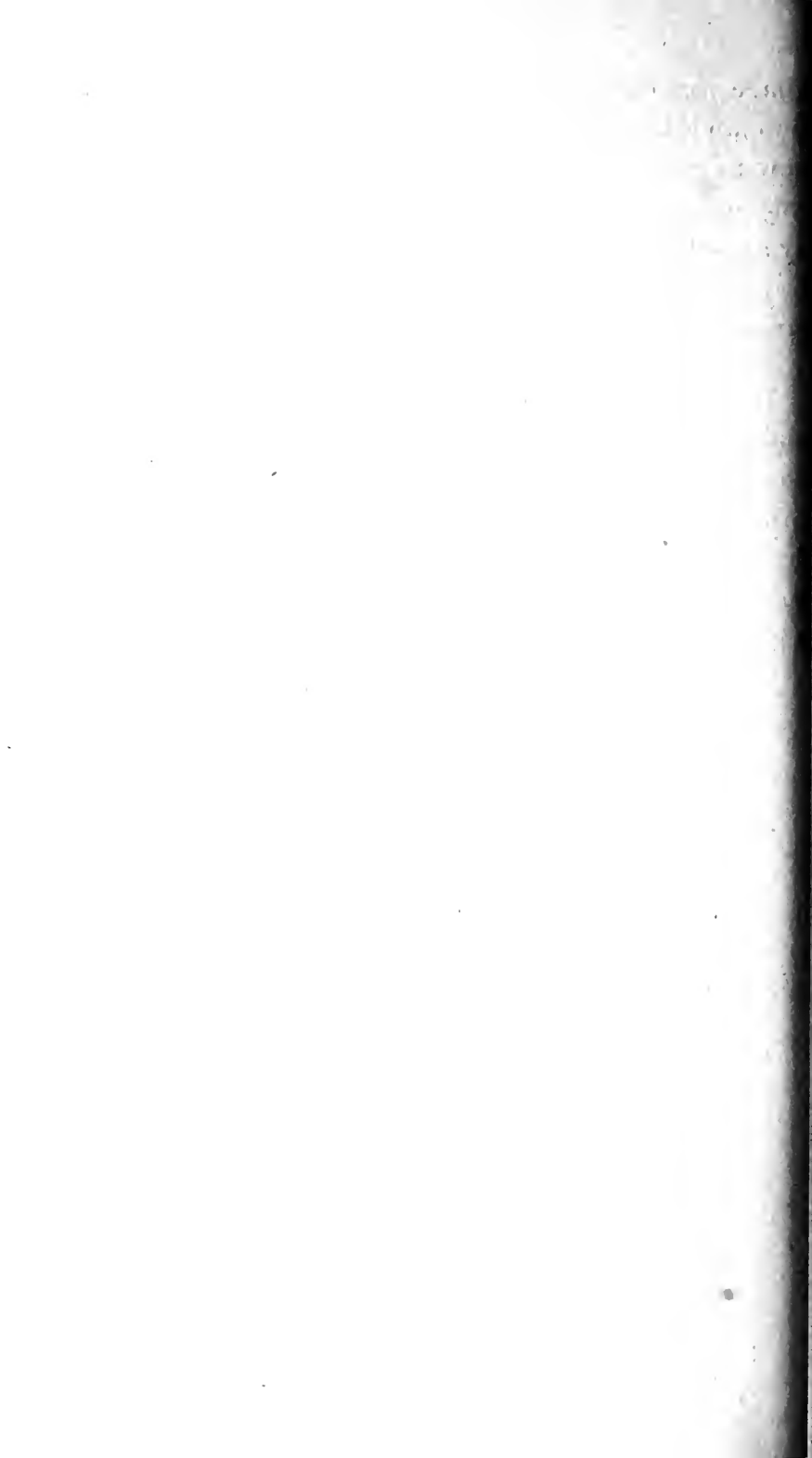
We do not retreat in the least from our position, maintained in our opening brief, that this statute had no application whatever to a widely used commercial product like roof primer. We are here content to demonstrate that appellee's own argument, at the very least, confesses the error of giving this instruction without carefully limiting its effect.

Respectfully submitted,

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United States Court of Appeals
For the Ninth Circuit

UNITED STATES *ex rel.*

ALEJANDRO RACA ALCANTRA,

Appellant,

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JOHN P. BOYD, District Director, Immigration and
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BRIEF OF APPELLANT

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES *ex rel.*

ALEJANDRO RACA ALCANTRA, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immi-
gration and Naturalization Service,
Respondent.

No. 14522

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Statutory provisions believed to sustain jurisdiction.

Jurisdiction of the District Court was invoked under
the provisions of Title 28 U.S.C., Sec. 2241, 62 Stat.
94, as amended, particularly as follows:

“(a) Writs of habeas corpus may be granted
* * * district courts * * * within their respective
jurisdictions. * * *

“(c) The writ shall not extend to a prisoner,
unless he is in custody or by color of authority of
the United States. * * *”

Jurisdiction of the Court of Appeals for the Ninth
Circuit is invoked under the provisions of Title 28,
U.S.C. Sec. 2253, 62 Stat. 967, as amended, particu-
larly as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. * * *

B. Statute, the validity of which is involved.

Paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(d) (7), 66 Stat. 182, provides:

"The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26), said subsection shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States and who seeks to enter the continental United States or any other place under the jurisdiction of the United States: PROVIDED, That persons who were admitted to Hawaii under the last sentence of Sec. 8(a) (1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of Sec. 1101(a) (27) of this title other than sub-paragraph (c) thereof, or unless they were admitted to Hawaii with an immigration visa. The Attorney General shall by regulations provide a method and procedure for temporary admission to the United States of aliens described in this proviso. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by Sec. 1227(a) of this title."

Existence of jurisdiction.

Pre-Trial Order (R. 1-5) states the basis for existence of jurisdiction in that appellant was in custody under color of authority of the United States.

CONCISE STATEMENT OF THE CASE

Appellant was born in the Philippine Islands, an American national, on May 7, 1907. He came to the United States as a permanent resident on February 2, 1928 (R. 1) and has never departed from the United States since that date unless his trips to Alaska in the course of his employment can be considered departures from the United States (R. 1). In 1948 appellant was convicted of the crime of burglary in California. In 1953 appellant went to Alaska to work in the American canneries there, as he had done for many years, and upon his return on August 6, 1953 (R. 2) he was arrested by respondent and exclusion hearings were held looking toward the deportation of appellant from the United States, respondent maintaining that under Section 212(a) (9) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(1)), appellant was subject to exclusion from the United States as an alien who had been convicted of a crime involving moral turpitude; and, further, that Section 212(d) (7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(d) (7)), makes the provisions of Section 212 applicable to any alien who leaves Alaska and seeks to enter the continental United States (R. 3).

Appellant was given no notice of the charge made against him, nor was he furnished an interpreter, al-

though he indicated that he could not read any language (Respondent's Exhibit A3) and that he could not speak and understand the English language "Just a little bit" (Respondent's Exhibit B1). The Hearing Officer concluded that appellant was subject to deportation and the Board of Immigration Appeals dismissed the appeal (Respondent's Exhibit B23).

Respondent then directed appellant to produce himself for deportation from the United States whereupon the within action was instituted in Federal District Court (R. 14).

The court thereupon ruled as a matter of law, and thereby presented the issues now raised on appeal, as follows:

(1) That the provisions of Sec. 212(d)(7) of the Immigration and Nationality Act of 1952 (8 U.S.C. Sec. 1182(d)(7)) apply to lawfully admitted aliens who are permanent residents of the United States who are returning to continental United States from the Territory of Alaska and that such aliens may be excluded from the United States if they come within any of the excluding provisions enumerated in Section 212(a) of said Act (R. 18).

(2) That the provisions of Sec. 212(d)(7) of the Immigration and Nationality Act of 1952 (8 U.S.C. Sec. 1182(d)(7)) are not limited to aliens seeking to enter the continental United States for the first time (R. 19).

(3) That Congress has the power to and may constitutionally exclude from the continental United States certain classes of aliens returning from Alaska and

had previously been lawful permanent residents of the United States (R. 19).

(4) That the hearing accorded appellant satisfied constitutional requirements of procedural due process of law (R. 19).

(5) That the appellant is an alien, being a Filipino who lost his status as a national of the United States on July 4, 1946, by virtue of the proclamation of Philippine Independence (R. 19).

SPECIFICATION OF ERRORS

A. The district court erred in concluding that the provisions of Sec. 212(d) (7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. Sec. 1182(d) (7)) apply to lawfully admitted aliens who are permanent residents of the United States upon their return to continental United States from the Territory of Alaska and that such aliens may be excluded from the United States if they come within any of the excluding provisions enumerated in Sec. 212(a) of said act.

B. The court erred in concluding that the provisions of Sec. 212(d) (7) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1182(d) (7)) are not limited to aliens seeking to enter continental United States for the first time.

C. The court erred in concluding that Congress has the power to and may constitutionally exclude from continental United States certain classes of aliens returning from Alaska who had previously been lawful permanent residents of the United States.

D. The court erred in concluding that the hearing

accorded appellant satisfied the constitutional requirements of procedural due process of law.

E. The court erred in concluding that appellant is alien.

SUMMARY OF ARGUMENT

The district court misconstrued congressional intent when it held that subsection 212(d)(7) subjected non-citizens who are lawfully admitted to continental United States for permanent residence to the exclusion process upon their return from Alaska. The subsection properly and consistently interpreted provides only for the potential exclusion of non-citizens who seek to enter continental United States *through* the territories. Since 1913, admittance to the territories is only conditional, not unqualified. *Healy v. Backus* (C.A. 9) 221 Fed. 358. The instant case, however, involves the status of a person who has been unqualifiedly admitted to the United States, and who has not since that admittance left the jurisdiction of the United States.

In any event, if Congress did intend to subject persons admitted unqualifiedly into the United States to the exclusion process, then subsection 212(d)(7) is unconstitutional. Once admitted unqualifiedly, non-citizens enjoy the status of persons entitled to constitutional guarantees: *Bridges v. Wixon*, 326 U.S. 135. They can travel throughout the United States in pursuance of their right to work, which is a right necessarily included in the right to enter: *Truax v. Raich*, 239 U.S. 33. Upon their return from Alaska to the mainland they cannot, therefore, be considered as

ant aliens: see, *Barber v. Gonzales*, 74 S.Ct. 822; *Wong Hai Chew v. Colding*, 344 U.S. 590; *Carmichael Delaney* (C.A. 9) 170 F.(2d) 239; *United States v. Haughnessy* (S.D. N.Y.) 113 F.Supp. 49.

Appellant received no notice of charges against him nor was he provided with an interpreter; the record clearly shows that he is illiterate and only understands English "a little bit." Under the circumstances the constitutional requirements of procedural due process were not met. *Kwock Jan Fat v. White*, 253 U.S. 454.

Appellant is not an alien. He never "entered" the United States. He came here as an American national and never performed any voluntary act to shed that nationality. *Perkins v. Elg*, 307 U.S. 325; Congress has never acted to denationalize Filipinos residing in the United States and it should not be assumed that Congress intended to do so by inference.

ARGUMENT

Congress Did Not Intend to Provide for the Exclusion of Persons, Like Appellant, Lawfully Admitted to Permanent Residence in the Continental United States Upon Their Return From Alaska After Travel Directly to and From Alaska by United States Transport Facilities in Pursuance of Their Seasonal Contractual Employment.

The pertinent portion of paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 66 Stat. 182, provides:

"The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who

seeks to enter the continental United States or at any other place under the jurisdiction of the United States. * * *”

Subsection 212(a), 66 Stat. 182, enumerates the excludable classes of aliens, and is introduced by the following language:

“Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.”

The visas referred to are either immigrant or non-immigrant visas. (See sections 203-11 of the Act. 66 Stat. 175-181.)

Subsection 101(a)(15), 66 Stat. 166, defines the term immigrant alien as “every alien except an alien who is within one of the following classes of non-immigrant aliens.” House Report, No. 1365, February 14, 1918, at pages 36-37, explains the basic distinction between immigrants and non-immigrants:

“Aliens who meet the qualitative tests and are eligible for admission into the United States are classified under existing law as either immigrants or non-immigrants. *The immigrant class includes those aliens who seek to enter the United States for permanent residence*, while the non-immigrant class includes those aliens who seek to enter for temporary periods of stay.” (Emphasis supplied)

This definition is in full accord with the proposition that immigration concerns immigrants and permanent residents; see, *Lapina v. Williams*, 232 U.S. 78. The power to exclude does not extend to persons lawfully resident in the United States, for when “Th

ing in legal contemplation no entry, there * * * [can] be no exclusion." *Carmichael v. Delaney* (C.A. 9) 170 (2d) 239, 243.

The provisions of subsection 212(d) (7), it is noted, only apply to an alien who "seeks to enter the continental United States."

Subsection 101(a) (131), 66 Stat. 166, defines entry as:

"* * * any coming of an alien into the United States from a foreign port or place or from an outlying possession. * * *"

The provisions of subsection 212(d) (7), it is noted, only apply to an alien who "seeks to enter the continental United States."

A cursory reading of paragraph (7) of subsection 212(d) might lead to the conclusion that Congress intended to treat any coming of an alien from the territories as an entry into the United States for the purposes of exclusion. If such an interpretation is adopted, however, it immediately raises the problem of an apparent inconsistency in the use and meaning of the term "entry" since an entry is defined as the "coming of an alien * * * from a foreign port or place or from an outlying possession," whereas Alaska and the other territories are not foreign ports or outlying possessions. (The outlying possessions are defined in subsection 101(a) (29), 66 Stat. 166, as "American Samoa and Swain Islands.") Indeed, Alaska, and the other territories enumerated in subsection 212(d) (7) are defined as part of the United States, in the geographical sense, in subsection 101(a) (38), 66 Stat. 166.

Assuming, however, that there is no inconsistency between subsection 212(d)(7) and the definition of the term "entry", see, *Helvering v. Credit Alliance Corp.* 316 U.S. 107; *United States v. Raynor*, 302 U.S. 540, the import of subsection 212(d)(7) should be to provide for the exclusion of aliens resident in the territories who seek to acquire permanent residence in the continental United States "from a foreign port or place or from an outlying possession" *via* one of the territories.

An examination of the legislative history of the paragraph confirms this latter interpretation. The original version, S. No. 2550, p. 66, and H.R. No. 567, p. 36, provided as relevant:

"The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave *the Canal Zone, Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, or any outlying territory or possession of the United States*, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. * * *" (Emphasis supplied)

The italicized portion is that which was deleted by Congress before final passage. The reason for the deletion seems obvious, since, to retain that language would render the subsection redundant in view of the definition of "entry", which itself subjects travel from the deleted areas to the exclusion provisions of the Act; that is, there would be a direct entry into the continental United States from those areas, rather than an entry *through* a territory of the United States. T

act that the Canal Zone and the outlying possessions appear in the original bills apparently was the result of the ancestry of the provision. Former 8 U.S.C. 173, 9 Stat. 874, passed in 1917, is specified by *the House report, supra*, at pages 144-145, as the immediate predecessor to subsection 212(d) (7). It provided:

"The term 'United States' shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone; but if any alien shall leave the Canal Zone or any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

This legislative genesis is more important, however, due to the fact that (as stated in House Report, *supra*, at page 53, and Senate Report, No. 1137, January 29, 1952, at p. 14):

"Section 212(d) (7) of the bill continues in effect the special procedures applicable to aliens who travel from the Panama Canal Zone, territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens traveling from Alaska to the continental United States. * * *"

It should be noted that the reports state that the paragraph applies to aliens who *travel from*, rather than *return from*, the territories to the continental United States.

The former law drew the distinction between the continental U. S. and the insular territories. The latter category includes Hawaii, but not Alaska; see former 8 U.S.C. Sec. 297, 32 Stat. 177: see, former 8 U.S.C. Sec. 295, 32 Stat. 176, 33 Stat. 428, since Alaska was considered to be part of the mainland. Under the present law however, Congress recognizes three categories of American territory; the continental United States, the territories (including Alaska), and the outlying possessions (which for purposes of entry are treated as foreign ports). This fact explains why the reports state that only travel from Alaska is modified by subsection 212(d) (7).

A further examination of the historical background of subsection 212(d) (7) moreover, discloses that the rationale behind the exclusion of aliens coming to the continental United States from the insular territories has been the theory that the original entry into the territories is only *conditional*, and not one permitting automatically, an unqualified entry into the continental United States.

The cases of *In re Singh* (N.D. Cal.) 209 Fed. 77 and *Healy v. Backus* (C.A. 9) 221 Fed. 358, involve the validity of amended paragraph (3) of Rule of the 1913 regulations of the Commissioner General of Immigration, which provided (as quoted in the *Healy* case, *supra*, at 362):

“That aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not ma-

bers of the excluded classes or likely to become public charges if they proceeded to the mainland."

In discussing this rule, the Court of Appeals pointed out in the *Healy* case, *supra*, at 362-363:

"* * * The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the mainland when such likelihood would not exist as to them in the insular possessions, and hence they are subject to further examination upon their entry at continental ports."

Regarding the basis for the new rule, the District Court in the *Singh* case, *supra*, stated at 703-4:

"There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. * * * A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines."

The Court of Appeals in the *Healy* case, *supra*, at 363, agreed:

"* * * Why is it not a reasonable and perfectly natural * * * [practice] to admit such persons to the insular possessions on condition that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Con-

gress. *The admission to the insular possession under the amended Rule 14 is not an admission generally, but only qualifiedly and conditionally so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission.*" (Emphasis supplied)

Thus, the exclusion of aliens who seek to enter the continental United States for permanent residence from the insular territories was upheld precisely because the original entry into the insular territories was not an unqualified admission into the United States generally. See also: *Matsuda v. Burnett* (C.A. 9) 68 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) F.(2d) 207.

This conditional entry theory is not only totally consistent with the proposed interpretation of the instant provision, indeed from an examination of the congressional debates it becomes clear that it was the theory which guided Congress in its passage of subsection 22(d) (7).

On April 14, 1952, as reported in 98 Cong. R. M. 69¹ the proposed act was opened for amendment in the House of Representatives. Mr. Farrington, delegate from Hawaii, introduced the following addition to the proposed definition of the phrase "lawfully admitted for permanent residence" in paragraph (2) of the subsection 101(a):

"Persons who were admitted to Hawaii under

¹Page references hereafter are to this issue of the Congressional Record.

the last sentence of section 8(a) (1) of the Act of March 24, 1934, as amended (48 Stat. 456), shall be deemed to have been lawfully admitted for permanent residence." (page 4468)

The act referred to is the Philippine Independence Act which subjected Filipinos who came to the mainland after 1934 to the immigration laws. As nationals they could before then come to the continental United States without restrictions: see, *Toyota v. United States*, 268 U.S. 402; *Gonzales v. Williams*, 192 U.S. 1; *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553. The "last sentence" referred to, exempted from immigration restrictions those Filipinos who only sought entry into Hawaii. Thus the proposed addition would have made those Filipinos who came to Hawaii unrestricted by the immigration laws, permanent residents of the United States.

Mr. Walter, the co-author of the act, concluded his argument against the addition as follows:

"* * * to adopt the amendment, by so doing, you are saying, 'You can come to the mainland,' and I do not think we ought to do that." (page 4469)

This comment is vitally significant, for it is a clear expression of Mr. Walter's opinion that if an alien is a permanent resident of the United States, residing in Hawaii, he cannot be prevented from traveling to the continental United States.

The amendment was rejected, but later on the same day Mr. Farrington, as a companion proposal, introduced the following substitution for the pertinent provisions of subsection 212(d) (7) :

"The provisions of subsection (a) * * * shall be applicable to any alien who shall leave the Canal Zone, Guam, Puerto Rico, or the Virgin Islands of the United States or any outlying territory or possession of the United States, other than Hawaii or Alaska, and who seeks to enter the continental United States. * * *" (page 4471).

The debate on the proposed amendment again confirms the suggested interpretation. Mr. Farrington stated in support of the amendment:

"The purpose of this amendment is to give aliens who now enjoy the status of permanent residents of the Territory of Hawaii the status of permanent residents of the United States.

"The practical result of the adoption of the amendment would be to provide for aliens in Hawaii who are permanent residents the same privilege of travel to the States and among the States that is permitted to aliens who are permanent residents of the States." (page 4472)

Mr. Walter in reply to this argument did not challenge the underlying thesis that permanent residents of the United States are unaffected by the section. He stated, in part:

"* * * It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened. There they are, and if this amendment is adopted they would come to the United States without any further screening and could remain here. * * * It is entirely a question of aliens coming to the United States, and I for one do not think that they should be admitted whether they come from Hawaii or whether they come from Europe, without being

screened in order to determine whether or not they are subversive.”² (page 4473)

“The only thing under this law that is required of them is an additional screening when they arrive at the Pacific Coast in order to determine whether or not they are admissible under the general immigration laws of the United States; that is all.” (page 4473)

The tenor of Mr. Walter’s argument is markedly reminiscent of the discussion in *Healy v. Backus, supra*.

To recapitulate the history of restrictions upon entry from the territories: In 1913, by regulation, the practice of admitting aliens into the continental United States automatically upon proof of lawful admittance into the insular territories was abandoned for the practice of making the original entry into the territory conditional only, subjecting the alien who seeks entry into the continental United States to further exclusion proceedings. This procedure was upheld, in 1915, upon the conditional entry theory, in *Healy v. Backus, supra*.

In 1917, Congress legislated generally on the subject, but did not restrict travel of aliens from Alaska, which at that time was treated as part of the continental United States.

In 1952, Congress provided that admittance from Alaska should likewise be conditional, no longer entitling aliens with such residence to admittance to the continental United States as a matter of right.

These comments are consistent with the proviso in subsection 212(d)(7) which withholds from Filipinos who entered Hawaii unrestricted by the immigration laws the exemption from the visa-exclusion provisions of paragraphs (20) and (21) of subsection 212(a).

Appellant herein, however, is a non-citizen who has already been unqualifiedly admitted to the continental United States for permanent residence; he is not therefore, an immigrant seeking to come to the mainland; see *Barber v. Gonzales*, 74 S.Ct. 822.

The mere fact that his employment requires him to travel to the territory of Alaska does not alter the nature of his original entry, or his status as a resident of the United States: see *Kwong Hai Chew v. Colding*, 344 U.S. 590; *Carmichael v. Delaney*, *supra*. In *United States v. Shaughnessy* (S.D. N.Y.) 113 Supp. 49, after the mandate of this court in the *Chew* case had been returned, Chew brought a supplemental writ of habeas corpus to test the validity of the District Director's denial of bond pending his hearing. The District Court ordered Chew released, and stated, referring to the decision of *Kwong Hai Chew v. Colding*, *supra*, at 53:

"[The] * * * underlying rationale appears to be that the circumstances of his employment as a seaman on a ship of American registry did not break the continuity of his permanent residence so as to deprive him of those rights which clearly be enjoyed as an alien resident on terra firma."

It should be noted that the departure from the continental United States in the *Chew* and *Carmichael* cases involved travel to foreign ports and territories. Here, however, *the travel involved is within the United States after unqualified admission into the United States*. In the words of Representative Walter, as permanent resident of the United States "[he] can come to the mainland."

Thus, the District Court erred when it concluded in *L.W.U. v. Boyd*, 111 F.Supp. 802, that the exclusion provisions of subsection 212(a) applies to appellant and others in like situation because "The words 'any alien' include aliens situated as are those here involved," *International Longshoremen's and Warehousemen's Union v. Boyd* (W.D. Wash.) 111 F.Supp. 802, 806. Such a conclusion fails to appreciate that the words "any alien" are modified by the phrase "who seeks to enter the continental United States." The alien involved herein, however, is not seeking to enter the United States; he is already lawfully admitted for permanent residence.

It should be noted that the District Court in the instant case referred to and adopted throughout the reasoning and decision of the three judge court in its *per curiam* decision in the case of *International Longshoremen's and Warehousemen's Union, Local 37 et al. v. Boyd, etc.*, 111 F.Supp. 802 *et seq.* (R. 7).

I. Congress Does Not Have the Constitutional Power to Provide for the Exclusion of Aliens Who Are Lawfully Admitted to the Continental United States When They Seek to Return After Travel Directly to and From Alaska in Pursuance of Their Seasonal Employment in Alaska.

The court concluded as regards the constitutional issues here presented, in *International Longshoremen's and Warehousemen's Union v. Boyd*, 111 F.Supp. 802, at 807:

"* * * Keeping clearly in mind the vast and broad powers of Congress to enact legislation excluding or expelling aliens as balanced against

the limited constitutional rights of all aliens, including lawfully admitted resident aliens of continental United States, we cannot hold that that portion of the statute under attack offends or goes beyond the constitutional authority vested in Congress even though its provisions make applicable restrictions upon aliens leaving the territories of the United States, including Alaska, and entering or reentering other territories, states or places under United States jurisdiction when not applicable to aliens permanently resident in or traveling within or between the states. Neither are we aware of any constitutional limitation upon the power of Congress which would forbid its classification in the same category, for the purpose of exclusion, lawfully admitted aliens permanently residing in continental United States when seeking reentry into the states from a territory of the United States, and similarly situated aliens seeking reentry to the United States from a foreign land."

The first relevant inquiry, therefore, is: What is the nature and source of the exclusion power? In the early *Head Money Cases*, 112 U.S. 580, the power of Congress to impose a head tax upon the ship companies for every alien brought into the United States was challenged; this court, identifying the power employed, stated, *supra*, at 595:

"* * * The power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident to the regulation of commerce, of that branch of foreign commerce which is involved in immigration."

Having established the constitutional source of the

power to regulate immigration, the opinion concluded, *supra*, at 600:

“* * * Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign Nations, *we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution.*” (Emphasis supplied)

The italicized portions from the opinions in the *Head Money* and *Chinese exclusion* cases, demonstrate that, from the earliest judicial consideration of the exclusion power, it has never been argued or assumed that the power was unrestricted. *The power to exclude is a sovereign power*, but one arising from the power delegated to Congress to regulate foreign commerce, and *which is limited by the Constitution.*

In the leading case of *Ikiu v. United States*, 142 U.S. 51, these concepts were restated, *supra*, at 659, as follows:

“It is an accepted maxim of international law, that every sovereign nation has power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulated

commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. U.S. Const. art. 1, & 8; *Head Money Case* 112 U.S. 580; *Chae Chan Ping v. United States* 130 U.S. 581, 604-609."

Thereafter, *supra*, at page 660, the opinion amplified the limitations upon the exclusion power:

"* * * It is not within the province of the judiciary to order that *foreigners who have never been naturalized, nor acquired any domicile residence within the United States, nor even been admitted into the country, pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, decisions of executive or administrative officers acting with powers expressly conferred by Congress, are due process of law.*" (Emphasis supplied)

These concepts were recently reaffirmed in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543:

"Thus the decision to admit or to exclude an alien may be lawfully placed with the President who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such author-

is final and conclusive. *Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien.*" (Emphasis supplied)

When Congress exercises the commerce power in fields other than immigration, it is clear that "resort to the Commerce Clause can [not] defy the standards of due process." *Secretary of Agri. v. Central Roig. Ref. Co.*, 338 U.S. 606, 616.

Moreover, and more important to the issues involved herein, the status of imports (immune from state taxation) survives only "until they are sold, removed from the original package, or put to the use for which they are imported." *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 657. In other words, once goods are merged with the general mass of goods within the United States they lose their status as imports. Similarly, once aliens have lawfully acquired permanent residence, they cease, in the constitutional sense, to be immigrants. They may be deported pursuant to law, but they have become "invested with rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment," *Bridges v. Wixon*, 326 U.S. 135, Justice Murphy concurring at 161, and quoted with approval in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-597 (footnote 5). Their "status as * * * person[s] within the meaning and protection of the

Fifth Amendment cannot be capriciously taken from [them]." *Kwong Hai Chew v. Colding, supra*, at 603.

Once an alien is "admitted to the United States under the Federal law * * * [he is] admitted with the privilege of entering and abiding in the United States and hence of entering and abiding in any state of the Union." *Truax v. Raich*, 239 U.S. 33, 39.

Paragraph (38) of subsection 101(a), 66 Stat. 1606 defines United States as:

"* * * except as otherwise specifically herein provided, when used in a geographical sense * * * the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

Paragraph (36) of subsection 101(a), 66 Stat. 1606 provides:

"The term 'State' includes (except as used in section 310(a) of title III [not involved herein]) Alaska, Hawaii, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States."

Thus, while it is true, as is stated in *Hooven & Alison Co. v. Evatt, supra*, at 671-672:

"The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution."

it is clear that when dealing with the status of alien lawfully admitted for permanent residence, the term

"United States" is used in the sense of "the territory over which the sovereignty of the United States extends."³ See *Toyota v. United States*, 268 U.S. 402;

Although Congress can regulate the territories free of the constitutional restrictions regarding legislation for the States; see, e.g., *Downes v. Bidwell*, 182 U.S. 244; *Hawaii v. Mankichi*, 190 U.S. 197; *Balzac v. Puerto Rico*, 258 U.S. 298; when it deals with the status of resident aliens, it is subject to constitutional restrictions. The instant provision, as interpreted, is a restriction on the status and rights of persons to travel, work and remain within the territorial limits of the United States; it is not merely the regulation of the territories.

Under present statutes, for example, aliens who have been convicted of a single crime involving moral turpitude prior to entry are excludable (Section 212(a)(9), 66 Stat. 182), whereas, to be expellable, the crime must have been committed within five years of the last entry (Section 241(a)(4), 66 Stat. 204). Moreover, even if the non-citizen gains admittance upon his return from Alaska, if the return is treated as a new entry, new possibilities for expulsion may arise because of the temporal proximity of the later entry to acts which may be committed in the future. Thus there would be a substantial change of status in any event.

This meaning is also indicated by subsection 212(d)(7) itself, since its provisions cover travel from the territories to "the continental United States or any other place under the jurisdiction of the United States." *Gonzales v. Williams*, 192 U.S. 1.

The appellant herein enjoys employment rights, pursuant to a lawful collective bargaining contract negotiated by his Union, in the territory of Alaska which constitutes the source of a substantial portion of his yearly income. Providing for the exclusion of persons like petitioner who could not otherwise be expelled, and see *Mangaoang v. Boyd*, 205 F.(2d) 553, cert. denied, 346 U.S. 876) and *Barber v. Gonzalez*, *supra*, if they travel to Alaska, is tantamount to providing for the forfeiture of their job rights heretofore enjoyed there. To deny such job opportunities is "tantamount to the assertion of the right to deny their entrance and abode, for in ordinary cases *they cannot live where they cannot work.*" *Truax v. Raich*, *supra*, at 42 (Emphasis supplied).

In *Kwong Hai Chew v. Colding*, *supra*, at 592, the facts relevant to residence and employment were:

"* * * the resident alien is a seaman, he currently maintains his residence in the United States and usually is physically present there, however, when he is returning from a voyage as a seaman on a vessel of American registry with its home port in the United States, that voyage has included scheduled calls at foreign ports in the Far East. * * *

The court thereafter stated *supra*, at 600:

"* * * the constitutional status which petitioner indisputably enjoyed prior to his voyage * * * [was not] terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

and also commented, *supra*, at 598-599:

“* * * we interpret this regulation as making no attempt to question a resident alien’s constitutional right to due process. Section 175.57(b) uses the term ‘excludable’ in designating the aliens to which it applies. That term relates naturally to entrant aliens and to those assimilated to their status. The regulation nowhere refers to the expulsion of aliens, which is the term that would apply naturally to aliens who are *lawful permanent residents physically present within the United States*.” (Emphasis supplied)

Paragraph (7) of subsection 212(d), as interpreted, provides, in any event, that resident aliens whose employment requires that they travel to Alaska (as distinguished from foreign ports) be “treated as * * * entrant alien[s]” upon their return, despite the fact that they have never left the territory of the United States. We are thus confronted with a far more compelling example of the issue left in doubt in the *Chew* case, *supra*.

If the status of permanent resident alien, which cannot be capriciously taken,” and which, if taken, deprives one “of all that makes life worth living,” has any substantial significance, *it must survive travel within the United States in pursuance of one’s employment*, a right which is necessarily included in the right to enter the United States: *Truax v. Raich*, *supra*.

The power to exclude, as has been seen, is derived from the power to regulate foreign commerce: *Head Money Cases*, *supra*; *Ikiu v. United States*, *supra*. Thus the requirement of an entry into the United States becomes a pre-condition to exclusion: *Carmi-*

chael v. Delaney (C.A. 9 170) F.(2d) 239, is not merely a statutory precondition, but is, in fact *the constitutional precondition to exclusion*. Appellant came to the United States as an American national on an American ship. He worked in Alaska in American canneries, going to and from Alaska in the course of his employment, in American ships and planes. He never "entered" the United States in the statutory sense; *Barber v. Gonzales, supra*, it is apparent that congressional power to exclude appellant and others of his status cannot arise from the power to regulate *foreign* commerce. Thus the essential question is: Does an alien enter, in the constitutional sense, upon his return from Alaska to his permanent residence on the mainland, when he has never left the territory of the United States?

We are not, it must be emphasized, dealing with the rights of "foreigners who have never * * * acquired any domicile or residence within the United States." *Ikiu v. United States, supra*. Nor are we dealing with inanimate goods, which may constitutionally be considered imports although their origin of transit is the territories and not foreign ports: see *Hoover & Allison Co. v. Evatt, supra*. We are concerned with the status of a person lawfully admitted to the United States for permanent residence who has never left "the territory over which the sovereignty of the United States extends."

When the power to exclude was challenged in *Heck v. Backus* (C.A. 9) 221 Fed. 358, the alien having acquired lawful residence in the territories, the exclusion was upheld because the alien had only ma-

conditional entry, and thus did not have to be expelled. The court stated, *supra*, at 363:

“* * * The admission is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes and not upon the grounds of having, after entry, become a public charge for causes theretofore existing after unqualified admission.”

The necessary and assumed converse of this rule is obvious: once an alien has obtained unqualified admission into the United States generally he may travel throughout the territory of the United States without fear of being excluded.

The Supreme Court was doubtful whether there was an entry, in the constitutional sense in the *Chew* case, where the alien's claim to continuous residence within the United States was based only on service on a vessel of American registry. If doubts exist under those circumstances, surely no doubt can exist where there is actual, continuous physical residence within the United States. To hold otherwise is capriciously to deprive the resident alien of his right to remain, travel and work within the United States; or, in actuality he would be *expelled* by the facile, semantic technique of labeling the expulsion an exclusion.

It is therefore submitted that subsection 212(d) (7) of the Immigration and Nationality Act, as interpreted and applied by respondent and his agents, transgresses the constitutional powers of Congress to regulate foreign commerce.

III. Appellant Was Denied a Fair Hearing.

The United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950) held that the hearing procedures of the Administrative Procedures Act were applicable to deportation hearings. Congress then passed an Act, 64 Stat. 1048 (1950), 8 U.S.C. Sec. 155a (Supp. 1952) specifically exempting deportation proceedings from the A.P.A. provisions. It is significant, however, that the court in *Wong Yang Sung v. McGrath*, *supra*, at page 50 discussed the possibility of such a course and held that it might be unconstitutional, stating "it might be difficult to justify" exempting deportation proceedings from the Administrative Procedures Act because the tribunal in that case would fail to meet "at least currently prevailing standards of impartiality." The court later, in *Kwong Hai Chew v. Colding*, *supra*, was even more definite, stating, at page 600

"From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

It thus appears that appellant at the very minimum was entitled to a fair hearing with all of the safeguards of due process.

The sections of the Immigration and Nationality Act of 1952 which apply to special inquiry hearings are:

Section 235(b) "Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273(d), who may not appear to the examining

ing immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry."

nd,

Sec. 236(a) "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under Sec. 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287(b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative pres-

ent, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such Inquiry, shall be kept.

It may be seen that few of the details of the hearing procedure are delineated in the statute. For instance, nothing is said in the statute about a notice of charges. The pertinent regulations, 8 Code Fed. Regs. Sec. 235.11, indicate that if an alien is to be detained for further inquiry, he must receive a "Notice to Alien Detained for Hearing by Special Inquiry Officer (Form I-122) the regulation goes on to state:

"If the alien is unable to read or understand the notice, it shall be read and explained to him by an employee of the Service, through an interpreter, if necessary, prior to the further inquiry before the Special Inquiry Officer."

Appellant was entitled to notice of the nature of the charges brought against him; such knowledge is an essential of a fair hearing; *Chin Chiu Fong v. Phelan* 181 F.(2d) 589 (C.C.A. 9 1950). From the record it is apparent that appellant received no such notice and because of this deficiency, appellant was unaware of the danger which faced him. Although appellant did receive Form I-122 (which in form is a printed strip of paper which looks quite insignificant) (See R. Respondent's Exhibit B-8), the Regulation quoted, *supra*, was violated in that the notice was not explained to him in any way prior to the hearing.

The whole content of the record of the hearing indicates that appellant had no understanding of the nature of the hearing. Appellant cannot read in an

language (R. Respondent's Exhibit A-9), speaks English very poorly and understands everyday English in a very limited way. He indicated that at the beginning of the hearing:

"Q. Do you speak and understand the English language?

A Just a little bit."

The inquiry officer chose to disregard the answers of appellant and to continue to ask him questions couched in the legal and technical terms that could not be understood by many native-born Americans with much more formal education than petitioner.

The courts have held there is an affirmative duty to inform the non-citizen of his rights. *U. S. v. Dunn* (C.C.A.N.Y. 1924) 297 Fed. 447. The Code of Federal Regulations, Code Fed. Regs. Sec. 236.11, states:

"* * * If the alien is not represented by an attorney or representative, the special inquiry officer shall advise the alien of his rights, as described in this section, and shall assist the alien in the presentation of his case. * * *"

It is clear that the inquiry officer in the instant case having ascertained that appellant could understand English "only a little bit" and could not read or write any language, had an affirmative duty to see that an interpreter was obtained. He also had an affirmative duty to stay proceedings until appellant could obtain assistance.

If an administrative hearing is to be more than a formalistic ritual, it must be fair at least as judged by administrative standards. *Kwock Jan Fat v. White*, 353 U.S. 545 (1920); *Chin Chiu Fong v. Phelan*, *supra*.

It is submitted that appellant did not receive a fair hearing in that he was not presented with a statement of charges; he did not have an interpreter and was not adequately informed of his rights.

IV. Appellant Is Not an Alien.

The all-embracing issue before this court is whether the appellant is now an alien. Obviously, if he is not an alien, the deportation proceeding against him must fall. Concededly, he was not an alien at any time in his life prior to July 4, 1946. He was born a national of the United States alone. He at no time had dual nationality. American nationality was his birthright. *Toyota v. United States*, 268 U.S. 402; *Gonzales v. Williams*, 192 U.S. 1.

The contention is, however, that by virtue of the United States- Philippine Independence Treaty and the Presidential Proclamation of July 1946, *supra*, the appellant was divested of his nationality and thereupon cloaked with alienage. It presently rests upon the rationale of the court in the case of *Cabebe v. Acheson*, 183 F.(2d) 795, wherein it was declared:

“* * * the Philippine Islands came to the United States by cession. And by such acquisition many individuals became nationals of the United States. Later, the United States relinquished sovereignty over them and their country. It follows Filipinos nationals of the United States inhabiting the island at the date of such relinquishment lost their status of nationality. The narrower question follows: Does such loss also occur as to Filipino nationals of the United States domiciled in the United States? * * *” (p. 880)

“* * * The status of United States nationality for Filipinos was the direct result of the United States’ assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.

“The United States had it desired it, could have provided that Filipinos permanently residing in the United States would not lose their United States nationality upon the recognition of Philippine independence. * * *

“The question is not directly answered (but, as we think, it was inferentially answered) * * * there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the islands on the date of their independence, * * *.” (p. 801)

“* * * It is our conclusion that the United States government intended the status of Filipinos, regardless of domicile or place of residence at the date of Philippine independence, to be entirely separate from any phase of adherence to the United States.” (p. 802)

The power of the United States as a sovereign nation to cede, dispose of or otherwise relinquish its sovereignty, *nolens volens*, over parts of its territory, together with the inhabitants residing therein subject to American sovereignty, is not here challenged. Preceding this to be an incident of sovereignty, *Jones v. United States*, 137 U.S. 702; *DeLima v. Bidwell*, 182 U.S. 1, it becomes an entirely different proposition to assert as an incident of sovereignty the right to expropriate or divest of nationality, *nolens volens* (and

expel from this country)⁴ nationals of the United States residing outside the ceded territory and within the jurisdiction of the United States at the time of cession, because of birth within said territory.

It is appellant's contention that the rights of nationals so situated are no different than would be those of United States citizens.

United States citizens cannot be divested of their nationality except through expatriation. The fundamental basis for expatriation is that there must be a voluntary act on the part of the individual to shed his nationality. In *Perkins v. Elg*, 307 U.S. 325, 338 the court said:

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance."

To the same effect, see *Savorgnan v. United States*, 338 U.S. 491, 497, 498; *MacKenzie v. Hare*, 239 U.S. 299.

That Congress cannot by fiat declare a loss of nationality has been held by this court on many occasions. In discussing that proposition the court said in *United States v. Wong Kim Ark*, 169 U.S. 649, 703:

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society possessing all the rights of a native citizen and standing, in the view of the Constitution, on the footing of a native citizen.'"

⁴Stripped of nationality, Congress may order the expulsion of Filipinos for any or no reason. *United States ex rel. Harisiades v. Shaughnessy*, 342 U.S. 580, 586, 598.

tive. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, * * * Congress having no power to bridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of Congress, * * * can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

It is undisputed that appellant never voluntarily renounced or abandoned his United States nationality or committed any act inconsistent with the rights and obligations of such nationality. It is urged by the Government, however, that appellant and all other persons of Filipino birth residing in this country prior to 1934, automatically lost their nationality by the treaty establishing the independence of the Philippine Islands.

If nationality is analogous to, and cloaked with the same protection that is accorded citizenship, then clearly appellant could not be divested of his nationality by that treaty, *residing as he did in this country*, than if he were a citizen. For the Philippine Independence Act of 1934 and the Treaty constituted no vol-

untary act of renunciation or self-expatriation on the part of petitioner. He did not vote on the ratification of the Independence Act of 1934; nor could he have voted thereon so long as he elected to remain within this country.

Is nationality, then, analogous to and protected like citizenship? Either it is, or else it must be analogous to alienage, for the constitution with respect to nationality recognizes only two categories.

The Constitution speaks of "citizens" and "natural born citizens" of the United States in Article I and Article II, and of "citizens or subjects" of foreign states in Article III. Before the passage of the Fourteenth Amendment it contained no definition of citizen. The Fourteenth Amendment says in its opening sentence, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside." The term "national" does not appear anywhere in the Constitution of the United States.

Because of this particularity in the language of the Constitution, any status recognized by the law, other than that of citizenship or alienage, must be assimilated to citizenship or alienage if it is to comport with the Constitution. Distinction may be made among citizens, and also among aliens, but any classes or sub-classes into which citizens or aliens may be divided may not combine the two major and mutually exclusive classes recognized by the Constitution. Unless this is so, the words of the Constitution are meaningless. An alien has been defined by the court in *Low v. Sney v. Backus*, 225 U.S. 460, 473, as:

“One born out of the jurisdiction of the United States and who has not been naturalized under their Constitution and laws.”

The essence of this definition is birth outside of the jurisdiction of the United States. This is the characteristic which distinguishes the alien and sets him apart in a class different from the citizen and national. A person having been born under the jurisdiction of the United States, lacked this essential characteristic of alienage. On the other hand, he was endowed with the positive essential characteristic of citizenship, to-wit: birth within the *jurisdiction of the United States*.

Next to birth, the all-important requirement and characteristic of citizenship is allegiance and fealty to the government. And this, too, is a concomitant of nationality. Speaking of persons born in the Philippine Islands, the court said in *Toyota v. United States*, 307 U.S. 162, 410:

“The citizens of the Philippines are not aliens. See *Gonzales v. Williams*, 192 U.S. 1, 13. They owe no allegiance to any foreign government.”

In the earlier case of *Fourteen Diamond Rings v. United States*, 183 U.S. 176, the court in referring to the Philippine Islands, said “Their allegiance became due to the United States and they became entitled to its protection,” p. 179.

In the Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. 501(b), adopted after the Philippine Independence Act, Congress equated nationals with citizens:

“The term ‘national of the United States’ means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States,

owes permanent allegiance to the United States. *It does not include an alien.*" (Emphasis supplied)

This concept, expressed in the 1940 Act was carried forward in the present 1952 law. Section 101(a) (1) of the Act. 8 U.S.C.A. 1101(a) (3), defines an alien to be:

"Any person not a citizen or national of the United States."

and it defines a national of the United States (Section 101(a) (22) 8 U.S.C.A. 1101(a) (22) as:

"(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

As part of his allegiance, a national is subject to the duty of bearing arms and giving his life, if necessary, in defense of this country. This appellant and native born Filipinos in this country have been subject to that duty and obligation *equally with all citizens.*

Thus, by the similarity of birth under United States jurisdiction; by the similarity of like allegiance to the country; by the similarity of like obligation to serve, defend and safeguard this country; by the similarity of the like protection due to them from this country, nationals have been equated with citizens. On the other hand, in no significant characteristic can they be equated with aliens. In fact, in every decision of the court, where the character of nationality had been discussed, the court was sharp to point out that nationality cannot be equated with alienage. *Gonzales v. Williams, supra; Toyota v. United States, supra*

It must therefore follow, that nationality, like citizenship, may not be lost, divested, forfeited or impaired without a voluntary act of renunciation or abandonment. Appellant, therefore, is still a national.

Assuming, however, that power to expatriate nationals resides in Congress, it is not seriously contended that Congress has so acted with reference to Filipinos residing in this country prior to the adoption of the Independence Act of 1934. This was admitted by the court in the *Cabebe* case, *supra*, when it held that loss of nationality had taken place. The court said:

"The question is not directly answered (but, as we think, it was inferentially answered) * * * there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of their independence." (p. 801)

The court there relied upon various acts of Congress from which it drew an inference that Congress must have intended to denationalize Filipinos residing in the United States.

Appellant's nationality, with which he was born, and which he has at all times maintained by unequivocal acts, may not be taken away by inference. See, *Manili v. Acheson*, 344 U.S. 133. In upholding United States nationality in *Perkins v. Elg*, 307 U.S. 325, 337, the court said:

"If the abrogation of that right [to elect nationality] had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity."

The court has never been unmindful that the law abhors forfeitures and will favor that construction of a statute which avoids such result. *Washington Pub. Co. v. Pearson*, 306 U.S. 30, 41; *United States v. One Ford Coach*, 307 U.S. 219, 226; *Knickerbocker Life v. Norton*, 96 U.S. 234, 242. Expatriation of a appellant is a forfeiture of the nationality he obtained by birth,—a forfeiture which deprives him of “that makes life worth living.” In a case involving the construction of a deportation statute, the court said:

“We resolve the doubts in favor of that construction [avoiding deportation] because deportation is a drastic measure and at times the equivalent of banishment or exile, * * *. It is the forfeiture * * * of a residence in this country. Since a forfeiture is a penalty * * * since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the word used. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 14.”

If resulting deportation evoked such concern from the Supreme Court because it is a forfeiture of residence in the United States, how much more should the court be concerned where an implied construction is being used to deprive petitioner not only of his residence but his birthright, his United States nationality. See also *Bennett v. Hunter*, 76 U.S. 326, 336.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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No. 14522

IN THE

United States
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FOR THE NINTH CIRCUIT

UNITED STATES ex rel,
ALEJANDRO RACA ALCANTRA,
Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization
Service,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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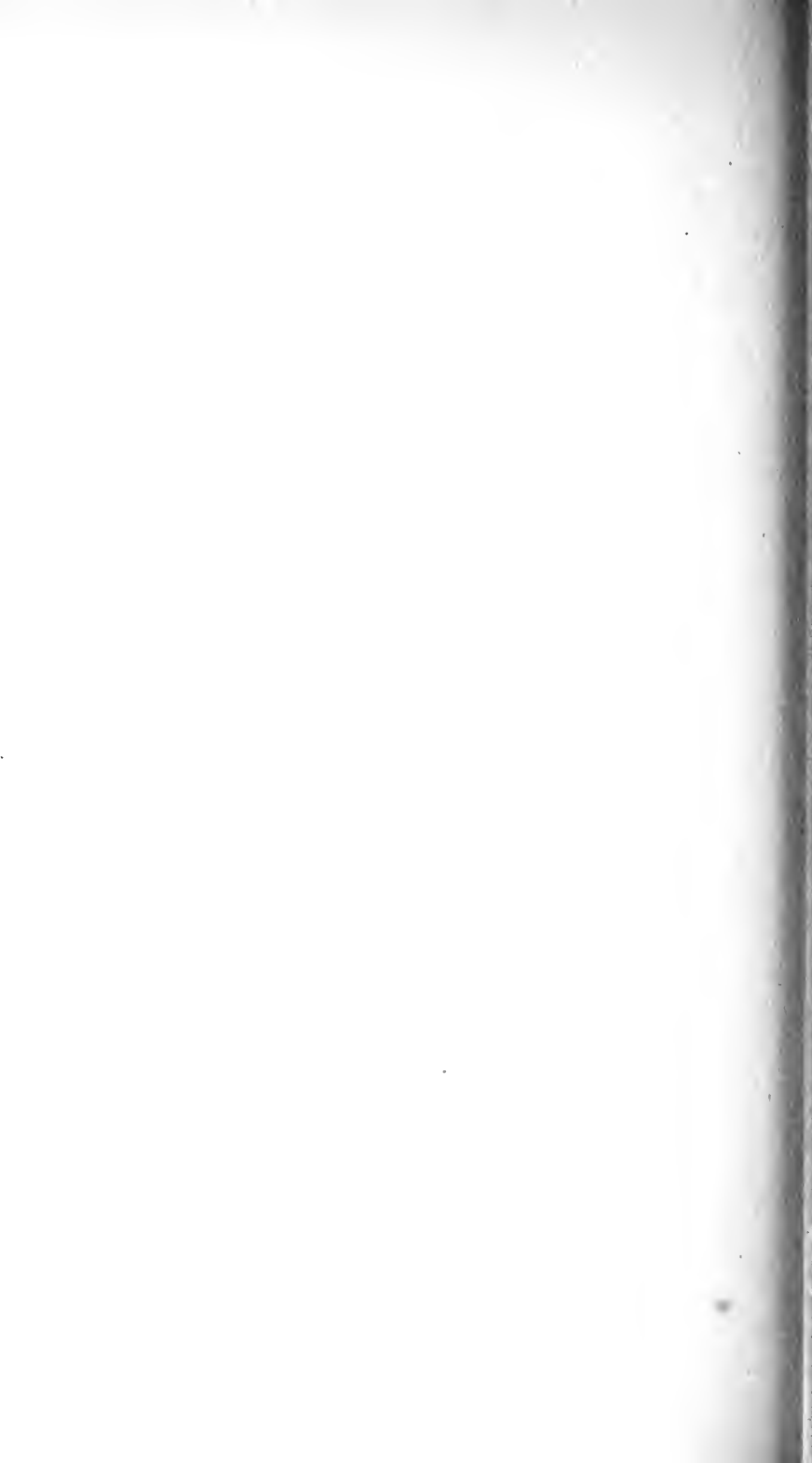
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BRIEF OF APPELLEE

ORDER APPEALED FROM

The order below is found at page 20 of the type-written record herein. The findings of fact and conclusions of law are found on pages 14 - 19.

JURISDICTION

The order of the District Court denying the application for a writ of habeas corpus was entered March 28, 1954. Notice of appeal was filed in the District Court July 23, 1954. Jurisdiction of this court to review on appeal the judgment of the District Court denying the writ of habeas corpus is invoked under the provisions of Title 28, U.S.C. Section 2253, 62 Stat. 967, as amended.

QUESTIONS PRESENTED

1. Whether Section 212(d)(7) of the Immigration and Nationality Act of 1952, requiring any alien arriving from Alaska to qualify for admission, properly interpreted as applying to aliens who have established legal residence in the continental United States and are returning from a temporary visit to Alaska.
2. Whether the section so construed is constitutional.
3. Whether the hearing accorded the appellant satisfied the constitutional requirements of procedural due process of law.
4. Whether the appellant is an alien.

STATUTES INVOLVED

In Section 212(a) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C.A. 1182 (a), Congress has provided that:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . .

This subsection then proceeds to list 31 categories of inadmissible aliens, including those deemed objectionable for subversiveness, criminality, and physical or mental afflictions.

Section 212(d)(7) of the Immigration and Nationality Act, 66 Stat. 188, 8 U.S.C.A. 1182 (d)(7), specifies additionally:

The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26)¹, shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States: Provided,² that persons who were admitted to Ha-

Paragraphs (20) and (21) relate to the documents that must be presented by aliens seeking permanent admission as immigrants; paragraph (26) describes the documents for aliens seeking temporary admissions as nonimmigrants.

This proviso relates primarily to Filipino laborers admitted to Hawaii under limited passports.

waii under the last sentence of Section 8(a) (1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of Section 101(a) (27) of this Act, other than subparagraph (C) thereof, or unless they were admitted to Hawaii with an immigration visa. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by Section 237 (a) of this Act.

STATEMENT

This action was brought when the appellant was taken into custody on March 29, 1954, by the appellee after an order of the special inquiry officer, dated August 17, 1953, excluding the appellant, was affirmed by the Board of Immigration Appeals (record pp. 1, 4). The issues were framed in a pretrial order to which the parties agreed (record p. 1). At the hearing in the District Court no evidence was offered other than the agreed facts recited in the pretrial order (record p. 1).

It appears that the appellant was born May

907, at Aparri, Cagayan, Philippine Islands. He first arrived in the United States at San Francisco, California, February 23, 1928, at which time he was admitted as a native of the Philippine Islands, not subject to Immigration laws. He thereafter resided in the United States without becoming a citizen thereof. He was convicted of the crime of burglary September 17, 1948. In May, 1953, he took employment in a cannery at Naknek, Alaska. He returned to the continental United States at Seattle, Washington, August 6, 1953, where, after inspection and a hearing by Immigration officials, he was excluded from admission under the Immigration and Nationality Act of 1952, effective December 24, 1952, Section 212 (a) (9) (8 U.S.C.A. 182(a)(9)), in that he was an alien who had been convicted of a crime involving moral turpitude, the provisions of such statute applying to any alien returning to the continental United States from Alaska under Section 212(d)(7) of said Act (8 U.S.C.A. 1182(d)(7), (record pp. 1, 2, 3.).

The agreed issues of law related to the interpretation of the statute, the constitutionality of such interpretations, fairness of the hearing, and alienage of the appellant (record p. 4). The exhibits of record are those of the appellee, the District Director, consisting of a transcript of the preliminary examination of the appellant at the time of his arrival at Seattle,

Washington; the transcript of the subsequent hearing before the special inquiry officer, and an affidavit of the primary immigration inspector (record p. 5 et seq.).

The District Court, indisposing of the issues of statutory interpretation and constitutionality, followed *Illwu v. Boyd*, 111 Fed. Supp. 802 (record p. 7); a decision of a Three-Judge Constitutional Court, and found that Section 212(d)(7) was properly construed as applying to resident aliens returning to continental United States from Alaska, pointing out that the statute "in plain and simple words" relates to "any alien", and that:

"We cannot escape the obvious meaning of the language used. The words 'any alien' include aliens cited, as are those here involved."

Rejecting the constitutional attack, the District Court adopted the language of the Three-Judge Court that: "The vast and broad powers of Congress" to legislate in regard to the admission or expulsion of aliens overbalanced and overcame the limited constitutional protections afforded to resident aliens. The court found no constitutional limitation which precludes Congress from adopting similar classifications, for the purpose of exclusion, in dealing with lawfully resident aliens seeking to reenter continental United States from territory of the United States or from a foreign country.

y. The court otherwise held that the appellant was an alien (record p. 11), and that at the hearings given him he was meticulously afforded his rights pursuant to procedural due process of law (record p. 9).

SUMMARY OF ARGUMENT

I

The first question to be disposed of is whether the statute properly is construed as applying to alien residents of the United States returning from a temporary visit to Alaska. Section 212(d)(7) of the Immigration and Nationality Act applies the excluding provisions of the Immigration laws to,

“Any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States and who seeks to enter the continental United States.”

The previous statute had a similar provision relating to arrivals from insular possessions which included the Territory of Hawaii. The principal change effected by the 1952 Act was the extension of these requirements to entrance from the Territory of Alaska.

Restrictions against entries from insular possessions have been enforced, without any successful challenge, for 50 years. In the studies which preceded

ed the 1952 Act, Congress considered the feasibility of ending them. Instead, they were retained and enlarged by the inclusion of Alaska. Efforts were made to eliminate Sec. 212(d)(7) on the floor of the House of Representatives, but the amendment was voted down. The debate indicates that Congress was impressed with the need for providing a screening process to prevent the free movement of subversives and other undesirables from the territorial possessions to continental United States.

There is nothing in the language of Sec. 212(d)(7) or its history to support a thesis that it was not intended to control alien lawful residents returning to continental United States from a territory as the previous Act provided, in the same way that the Act applies to resident aliens who go abroad to a foreign place. And there can be no warrant for changing the unambiguous, unqualified language of the statute. Moreover, it seems evident that Congress did not contemplate a limited reading.

Resident aliens who leave the United States voluntarily never have been deemed to have a vested right to return. Numerous decisions of this court have held that a returning resident alien is subject to all the exclusions of the immigration laws when he seeks to reenter. *The Chinese Exclusion Case*, 13

U.S. 581; *Lem Moon Sing v. United States*, 158 U.S. 38; *Polymeris v. Trudell*, 284 U.S. 279; *Shaughnessy v. Mezei*, 345 U.S. 206. Sec. 212(d)(7) should be read in the light of these holdings, as one element in an overall legislative design to bar objectionable alien residents who seek to return to the United States. For the purposes of this statute Congress assimilated Alaska to a foreign country. Although the explicit directions of the statute eliminate any need for fathoming the legislative purpose, it seems evident that in applying this restriction to travel from Alaska, Congress deemed that aliens guilty of subversion and criminality in the United States may be more objectionable than those coming from abroad. Congress doubtless also was aware of the exposed situation of Alaska, its proximity to Soviet Siberia, and the fact that aliens coming from Alaska must journey hundreds of miles before coming to continental United States.

Chew v. Colding, 344 U.S. 590, seems entirely inapplicable. There this Court merely concluded that under the circumstances of that case it was unfair to deny a hearing. The limited holding of that case as described in *Shaughnessy v. Mezei*, 345 U.S. 206.

II

As so construed, the statute is constitutional. The privilege of entering or remaining in the United States can not be characterized as a vested interest entitled to protection under the Constitution. On the contrary, numerous decisions of this court have concluded that Congress has sovereign power to determine which aliens shall be permitted to enter the United States and which shall be permitted to remain and that the courts cannot reexamine such political determinations. The controlling principles were reviewed and reaffirmed in *Harisiades v. Shaughnessy*, 342 U.S. 580; *Shaughnessy v. Mezei*, 345 U.S. 206 and *Galvan v. Press*, 347 U.S. 522. The *Mezei* case also confirmed many previous decisions which supported the exclusion of resident aliens seeking to return from a temporary absence. The fullness of the legislative power over the subject precludes any contention that its exercise by Congress has deprived an alien of a vested interest without due process of law.

There is nothing in the Constitution which prevents the exercise of this complete power in regard to aliens seeking to enter continental United States from Alaska. Although Alaska is an organized territory, it is not yet a state of the Union. While

Alaska concededly is not foreign territory, there is no reason why it must be treated as part of the United States for every legislative purpose. As a territory, the provisions of the Constitution safeguarding "fundamental" rights are applicable. But no "fundamental" right to travel from Alaska to continental United States can be claimed by aliens.

So long as Alaska remains a territory, it remains subject to the plenary control of Congress, under Art. V, Sec. 3, cl. 2 of the Constitution. *Alaska v. Troy*, 358 U.S. 101, directly sanctions the establishment of special controls for commerce and travel from Alaska.

Even if it is assumed that the reasonableness of the classification can be examined in this case, the classification clearly is reasonable. It stems from the congressional concern with alien subversives, its desire to limit their mobility, and with its feeling that screening is needed because of Alaska's special situation, particularly its proximity to Soviet Siberia.

III

The appellant is an alien. The facts are not in dispute (record p. 1). Each time this court has considered the status of former Filipino nationals it has held that under the proclamation of Philippine Independence on July 4, 1946, the Filipino lost the status

of national of the United States and became an alien whether an inhabitant of the islands or domiciled in the United States. *Cabebe v. Acheson*, C.A. 9, 18 Fed. (2d), 795; *Mangaoang v. Boyd*, C.A. 9, 205 Fed. (2d), 553; *Gonzales v. Barber*, C.A. 9, 207 Fed. (2d), 398.

IV

The record establishes that the appellant was served with proper notice that he understood the proceedings conducted in the English language and that he waived representation by counsel. (record p. 5, et seq.). The substantive facts upon which the exclusion order is based were not denied during the deportation hearing nor during the hearing on the writ of habeas corpus; and, therefore, if procedural error was committed, it would not have been prejudicial. *Summit Madokoro v. Del Guercio*, C.A. 9, 1947, 160 Fed. (2d), 164. Certiorari denied, 322 U.S. 764.

ARGUMENT

I

THE STATUTE IS PROPERLY CONSTRUED AS APPLICABLE TO AN ALIEN WHO SEEKS TO RETURN TO THE CONTINENTAL UNITED STATES FROM A SOJOURN IN ALASKA.

The first question on the merits relates to the application of Section 212(d)(7) to aliens who have established lawful residence in continental United States, have made a visit to Alaska and who are then returning. The view that such aliens are subject to exclusion if they fall within the classes which would originally have been excluded rests on a clear expression of Congressional intent. The statute itself specifically declares in Section 212(d)(7), 8 U.S.C.A. 182(d)(7), that its prohibitions "shall be applicable to *any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States.*" (Emphasis added.)

This language obviously is couched in unrestricted terms. Congress could have limited the thrust of this enactment to any alien resident of Alaska or any alien not returning to a residence in the United States

or any alien seeking to enter continental United States through Alaska. If such a narrow orbit had been contemplated, it would have been a simple matter to chart it. But instead of limiting its compass the statute speaks generally of "*any alien who shall leave*" Alaska and "*who seeks to enter the continental United States.*" (Emphasis added.) This comprehensive language hardly supports a limited reading. See *Kustas v. Williams*, 194 F. (d) 641, 644 (C.A. 2).

Section 212(d)(7) of the Immigration and Nationality Act of 1952 is not a departure from or radical extension of the historic policies of our immigration laws. On the contrary, it is a codification of half century's consistent practice announced in statutory and administration directives, which have consistently regarded the insular possessions of the United States for some purposes as the equivalent of a foreign country under the immigration laws. The only important change introduced by the 1952 Act is the extension to Alaska of exclusionary mandates previously applied to all insular possessions of the United States, including Hawaii.

The first statutory recognition of the concept appeared in Section 1 of the Immigration Act of February 5, 1917, 8 U.S.C. 173, which similarly con-

anded that an alien leaving an insular possession of the United States would not be permitted to enter the continental United States "under any other conditions than those applicable to all aliens." This language was deemed inapplicable to Alaska, which was not regarded as an insular possession within the contemplation of the 1917 statute. See *Chai v. Bonham*, 355 F. (2d) 207 (C.A. 9). But the statute's command and always was regarded as encompassing aliens who sought to come to the mainland from Hawaii, which like Alaska enjoys the highest political status among the territories of the United States.

The injunctions of the 1917 Act were consistently enforced, without any successful challenge, in regard to aliens wishing to enter the continental United States from Hawaii. Thus in *Matsuda v. Burnett*, 353 F. (2d) 272, 273 (C.A. 9), the court found that Japanese aliens lawfully admitted to Hawaii had no right to be admitted to the mainland and stated:

"It is true the territory of Hawaii is a part of the United States, but it is also an insular possession."

The court declared that although the statute defined Hawaii as part of the United States for some purposes, this definition did not preclude Congress from treating aliens coming from Hawaii as amenable to the restrictions of the immigration laws. To the

same effect are *Sugimoto v. Nagle* 38 F. (2d) 207 (C.A. 9), certiorari denied, 281 U.S. 745; *Karamoto v. Burnett*, 68 F. (2d) 278 (C.A. 9).

In the protracted deliberations which preceded the Immigration and Nationality Act of 1952, Congress had ample opportunity to reconsider the policy enunciated in Section 1 of the Immigration Act of 1917. Indeed, the original committee study recommended elimination of the restrictions against travel between the territories and possessions of the United States and the mainland, so that "a lawfully admitted alien resident of Hawaii, Puerto Rico, Alaska, and the Virgin Islands may travel between such places and between such places and the mainland, the same as aliens traveling between any of our 48 States." S. Rep. 1515, 81st Cong., 2d Sess., p. 674. And the original draft of the so-called Omnibus Bill (which launched the legislative process that eventually resulted in enactment of the McCarran-Walter Act) issued simultaneously with the Committee study as S. 3455, 81st Cong., 2d Sess., likewise contained no restrictions upon travel between Alaska and the United States. Such restrictions, however, were added in subsequent versions of this measure. S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess.

Undoubtedly, the main purpose of these provisions was to prevent excludable aliens from using

entry into and residence in the territorial possessions as a means of entry into the United States.³ The significant point, however, is that it was recognized in the course of debate that these restrictions did assimilate the territorial possessions to the status of a foreign country. Delegate Farrington of Hawaii, who labored diligently to have this restriction changed or eliminated, proposed two amendments to the bill⁴ in a preliminary colloquy with Representative Jennings. Mr. Farrington observed, 98 Cong. Rec. 4304:

We are subject to the immigration laws in the

This was the stated aim of the 1917 Act. S. Rep. 52 64th Cong., 1st Sess., p. 3, commented:

The second sentence (of section 1) is section 33, act of 1907, amended so as to make it perfectly clear that the admission of an alien to the insular possessions does not privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens have been using the insular territory (particularly the Philippines) as a 'stepping stone' to the continent, avoiding close inspection by first securing admission to the Philippines and then coming 'coastwise' to the United States proper."

Section 33 of the 1907 Act, 34 Stat. 908, directly affected only aliens seeking to come from the Canal zone.

Similar objections were voiced by Delegate Farrington and Resident Commissioner Fernos-Isern of Puerto Rico during the final hearings on the bills. See Joint Hearings before Subcommittees on the Judiciary, 62d Cong., 1st Sess., on S. 716, H.R. 2816, pp. 45-46 and 370.

same manner as are the States, with several exceptions. One of those exceptions is the requirement that aliens traveling from Hawaii to the mainland shall be subject to the *same restrictions as aliens traveling from a foreign country to Hawaii*. I hope to offer an amendment later to correct that, because I believe it is unnecessary and extremely unjust and imposes restrictions that are nothing more than a nuisance.

(Emphasis added.)

Delegate Farrington's first amendment, which sought to grant lawful residence privileges to Filipino laborers in Hawaii, was voted down. 98 Cong. Rec. 4401-4402. Thereafter Delegate Farrington offered his principal amendment, to strike from Section 212(d)(7) the restrictions upon travel from Alaska and Hawaii. 98 Cong. Rec. 4404. While the debate referred principally to the situation in Hawaii, it manifestly is relevant also to Alaska. In support of his amendment Mr. Farrington urged that the restrictions against the travel of aliens from Hawaii to the United States had outlived their usefulness, were unnecessary, and were contrary to the national interest. Id. 4405-4406. The opposition was led by Representative Walter, co-author of the bill and its principal sponsor in the House of Representatives. Representative Walter observed, id. 4406,

The only question is whether or not aliens not citizens of Hawaii, but aliens who happen to be in Hawaii, would be required to be screened be

fore they came to the United States. What great hardship would that work on them? It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened . . . It is entirely a question of aliens coming to the United States, and I for one do not think they should be admitted *whether they come from Hawaii or whether they come from Europe, without being screened in order to determine whether or not they are subversive.* (Emphasis added.)

Delegate Farrington's amendment was voted down, id. 4406, and the bill ultimately was enacted without any change in the language of this subsection.⁵

Thus, the underlying concept of Section 212(d) (7), recognized as such by Congress is that, for the

S. Rep. 1137, 82nd Cong., 2d Sess., accompanying the final version of the bill, declares, at p. 14:

Section 212(d) (7) of the bill continues in effect the special procedures applicable to aliens *who travel from the Canal Zone, Territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States.* Under the bill such procedures will also be applicable to aliens *traveling from Alaska to continental United States.* The requirements of the act of March 24, 1934, as amended (48 Stat. 456), relating to the documentation of certain natives of the Philippine Islands previously admitted to Hawaii are continued in effect." (Emphasis added.)

Substantially the same statement appears in H. Rep. 365, 82d Cong., 2d Sess., p. 53.

purpose of entry into the United States by aliens, the territorial possessions are different from the continental United States and in status like that of a foreign country.

Some have continued to urge that the restrictions upon travel between Alaska and continental United States be eliminated.⁶ Indeed, bills to remove this barrier have been introduced in Congress. H.R. 370; S. 952 83d Cong., 1st Sess. But we believe the legislative policy is explicitly declared in the statute and that the appropriate forum for urging a change in that policy is in the halls of Congress and not at the bar of this court.

The imposition of restrictions on entry from Alaska is equally applicable to the situation where the alien has previously resided in continental United States, has voluntarily gone to Alaska, and then attempted to return. In the first place there is clearly no exception for this particular situation in the language of the statute. In the second place, such an application is completely consistent with the Congressional policy followed for many years of limiting ar

⁶See *Report of the President's Commission on Immigration and Naturalization* (1953) pp. 183-184; *Hearings before the President's Commission on Immigration* (Sept. and Oct. 1952), pp. 1426-1428, 1490-1493.

an alien resident's right to reenter following a brief visit to a foreign country. Repeatedly the Supreme Court has held that an alien who leaves the United States voluntarily,⁷ for however brief an interval, makes an entry under the immigration laws upon his return. This principle was codified, with modifications not here relevant, in Section 101(a)(13) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1101(a) (13).⁸ Moreover, the leading decisions dealing with reentries emphatically dismiss the supposition that a resident alien who leaves the shores of the United States can insist on readmission when he returns. *The Chinese Exclusion Case*, 130 U.S. 581; *Lem Moon Sing v. United States*, 158 U.S. 8; *Polymeris v. Trudell*, 284 U.S. 279; *Shaughnessy v. Mezei*, 345 U.S. 206.

Appellants have sought to find some comfort in *Upina v. Williams*, 232 U.S. 78. (P. 8 Appellant's brief) But that holding summarily rejected the assertion that an alien resident of the United States has any vested right to return. For in that case the Supreme Court decided that Congress intended "to

an involuntary, unanticipated departure does not result in a new entry upon return to the United States. *Algadillo v. Carmichael*, 332 U.S. 388.

See S. Rep. 1137, 82nd Cong., 2d Sess., p. 4; H. Rep. 65, 82d Cong., 2d Sess., p. 32.

bring within the reach of the statute aliens who had previously resided in this country." 232 U.S. at 93. The Court also observed, *id.* 91, that the statute "sufficiently expressed . . . the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country." Similarly, in *Lewis v. Frick*, 233 U.S. 291, 297, the Supreme Court held that an alien who had visited Canada briefly was subject to exclusion upon his return and that his domicile in the United States

did not change his status so as to exempt him from the operation of the Immigration Act . . . if he departed from the country, even for a brief space of time . . . he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.

Probably the leading authority is *Volpe v. Smith*, 289 U.S. 422. There the Court upheld a deportation order against a permanent resident of the United States who had made a short visit to Cuba and who was found to have made an entry into the United States upon his return. The Court's opinion observed 289 U.S. at 425:

We accept the view that the word "entry" . . . includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one . . .

The Court brushed aside the assertion that the statute operated unfairly and stated, 289 U.S. at 425-426:

Aliens who have committed crimes while permitted to remain here may be decidedly more objectionable than persons who have transgressed laws of another country.

It may be true that if Volpe had remained within the United States, he could not have been expelled because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reentry. In sufficiently plain language Congress has declared to the contrary.⁹

We believe it highly appropriate to read Section 212(d)(7) in the light of the foregoing utterances. While the reentry doctrine concerns primarily aliens returning from a foreign port or place, it seems clear that Section 212(d)(7) was designed to assimilate Alaska to a foreign country for the purpose of limiting admissibility to the United States. This view of the statute is consistent with the legislative policy

See also *Claussen v. Day*, 279 U.S. 398; *Stapf v. Orsi*, 287 U.S. 129; *Polymeris v. Trudell*, 284 U.S. 479. Recent reiterations of this doctrine include *Schoeps v. Carmichael*, 177 F. (2d) 391 (C.A. 9), certiorari denied, 339 U.S. 914; *Schlimmgen v. Jor-*
dan, 164 F. (2d) 633 (C.A. 7).

in regard to alien residents who visit foreign territory. It is consonant also with the desire of Congress to restrict the activities and the mobility of alien charged with subversive activities in the United States.¹⁰ And, if any further evidence were needed it accords with the earlier administrative reading of comparable directives of the Immigration Act of 1917. *Matter of O'D.*, 3 I & N Dec. 632 (1949),¹¹ where it was held that a resident alien who had fled to Puerto Rico and returned had made an entry into the continental United States on his return.

The arguments marshalled to confront this clear legislative purpose to treat the outlying territories as equivalent to a foreign country seems quite insubstantial.

¹⁰See *Carlson v. Landon*, 342 U.S. 524.

¹¹Mention should be made of the statement in S. Rep. 1515, 81st Cong., 2nd Session, p. 658, where the committee in reviewing the previous law stated: "Alien residents of the continental United States are not subject to the exclusion provisions of the act of 1917 when traveling from the continental United States to any of our insular possessions and returning." This statement finds no support in any statute, administrative construction, or decision, and appears to be erroneous. Moreover, this observation related to the first draft of the so-called Omnibus Bill which proposed to end the restrictions upon travel from the territories to the continental United States. As we have pointed out (p. 13) this proposal subsequently was discarded and the committee thereafter adopted the formulation which now appears in the statute.

antial. In the first place, it is said that Congress defined Alaska as part of the United States for the purposes of the immigration laws. See Sec. 101(a)(38) Immigration and Nationality Act of 1952, 8 U.S.C.A. 1101(a)(38). But Congress itself fashioned the definition and retained the power to modify it. The definition itself relates "except as otherwise specifically provided." And Section 212(d)(7), in our view, manifestly provides otherwise, by directing, in effect that for the purposes of that subsection Alaska is to be regarded as equivalent to a foreign country.

The same considerations apply to the definition "entry" in Sec. 101(a)(13) of the Immigration and Nationality Act. This definition states the general rule that entry ordinarily is accomplished by coming from a foreign port or place. But in unmistakable language Congress has modified this definition in Sec. 212(d)(7), which declares that its commands relate to aliens who leave Alaska and seek to enter continental United States.

It is said also that it was intended to limit the impact of Section 212(d)(7) to aliens who previously had not satisfied the requirements of the immigration laws. But this argument overlooks the fact that at least since 1924 aliens entering Alaska have had to meet every qualification demanded by the immigra-

tion laws. Section 13(a) and 28(a), Immigration Act of 1924, 8 U.S.C. 213(a) and 224(a). Under the comprehensive language of Section 212(d)(7), it is obvious that even if an alien was lawfully admitted to Alaska, he nevertheless must undergo an additional screening if he seeks to enter continental United States. Therefore, the appellant cannot support his theory that the statute was intended to have the limited application for which he argued.

Appellant also contends that the exclusion provisions apply only to immigrants and that he is no longer an immigrant, since he already has been lawfully admitted for permanent residence. This contention overlooks not only the explicit directives of the statute itself, but the entire course of antecedent legislative policy. See p. 11, *supra*. The introductory language of Section 212 of the Immigration and Nationality Act 8 U.S.C.A. 1182 stipulates that its exclusions attach to "aliens". Section 212(a)(7) likewise refers to the exclusion of "any alien" and does not state that its restrictions are limited to alien immigrants. Moreover, even if the impact of the statute were regarded as limited to immigrants, the statute itself defines an immigrant as "every alien" except those specifically excepted, and describes nonquota *immigrants* as including resident aliens returning from a temporary visit abroad. See

on 101(a)(15) and (27), Immigration and Nationality Act, 8 U.S.C.A. 1101(a)(15) and (27), Thus, the appellant hardly can escape the reach of the statute whether he is regarded as an immigrant or non-immigrant. See *Volpe v. Smith*, 289 U.S. 422; *Lana v. Williams*, 232 U.S. 78; *Lewis v. Frick*, 233 U.S. 291.

It is said that Congress could not have intended to bar the travel of an alien resident from one part of the United States to another, since such a person is not actually leaving the United States. This hypothesis is rejected by the directives of the statute itself. For even if Alaska is regarded as a part of the United States for some purposes under the immigration laws, Section 212(d)(7) nevertheless is explicit in commanding that the excursions of those laws shall apply to persons in that part of the United States who wish to travel to the mainland. Certainly, even the appellant must admit that objectionable aliens residing in Alaska may be barred from continental United States even though it can be said that they are merely traveling from one part of the "United States" to another.

In the face of the explicit language of the statute, it seems idle to conjecture about the legislative purpose. But, as we have pointed out, the objective of

Section 212(d)(7), manifestly is to halt the spread of subversion and the opportunities for espionage and for other reasons, and to screen aliens so traveling. See *Carlson v. Landon*, 342 U.S. 524 535-6.¹² To paraphrase the language of the Supreme Court in the *Volpe* decision, Congress deemed that aliens who have been guilty of subversion or criminal activities within the United States may be more objectionable than aliens who have offended the laws of another country.¹³ Congress evidently wished to limit the mobility of such individuals and their capacity for harming the United States.

Congress was doubtless aware of the close proximity of Alaska to Soviet Siberia and the difficulty of maintaining adequate controls in the vast, sparsely-populated expanses of the Alaska outpost and its adjacent islands. Moreover, Congress undoubtedly did not regard travel from Alaska as comparable to

¹²In enumerating the "basic and significant changes" accomplished by the Immigration and Nationality Act of 1952, the House Committee stated that the bill "Provides for a more thorough screening of aliens especially of security risks and subversives." H. Rep. 1365, 82d Cong., 2d Sess., p. 28.

¹³The subversive alien, unlike one who engages in criminal activities, is deportable for obnoxious activities in the United States, without time limitation. See *Harisiades v. Shaughnessy*, 342 U.S. 580. Sec. 24(a)(6) and (7), Immigration and Nationality Act of 1952, 8 U.S.C.A. 1251 (a)(6) and (7).

travel within continental United States, since an alien returning from Alaska must traverse hundreds—perhaps thousands—of miles of ocean or air-space which are not within the territorial confines of the United States.

The supposition that the restrictions of Section 22(d)(7) were not intended to apply to aliens returning from Alaska to a residence in the United States thus is unsupported by anything in the statute itself or in the contemporaneous expressions of Congress. It stems only from a hypothetical legislative policy which would be pleasing to the appellant and which he is urging this Court to read into the law. But Congress inscribed no such limitation in the statute. And we cannot perceive any reasonable basis for departing from the normal unambiguous meaning of the language used by Congress and embarking on speculative effort to find another reading, not articulated in the statute and not supported by any indication of legislative design.

The reliance of the appellant on *Chew v. Colding*, 34 U.S. 590, likewise seems unpersuasive. That decision did not doubt the power of Congress to prescribe for the exclusion of alien residents who left the continental United States. On the contrary, the Court merely concluded that under the factual circumstances of that case Congress could not have in-

tended to deny Chew a hearing when he sought to return to the United States. The appellant does not refer to the subsequent decision of the Supreme Court in *Shaughnessy v. Mezei*, 345 U.S. 206, which described the limited reach of the *Chew* decision. In the *Mezei* case the Court carefully pointed out that "For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." 345 U.S. at 213.¹⁴

¹⁴A question may perhaps arise as to how an order of exclusion would be accomplished. The last sentence of Sec. 212(d)(7) states that the excluded alien "shall be immediately deported in the manner provided by Section 237(a) of this Act." Sec. 237(a), 8 U.S.C.A. 1227(a), specifies that an excluded alien shall be "deported to the country whence he came." This does not mean he would be deported to Alaska. "Country whence he came" is a term of art, previously used also in relation to the deportation of expelled aliens. See *Mensevich v. Tod*, 264 U.S. 134. It necessarily contemplates deportation to a foreign country. *Gagliardi v. Karnuth*, 156 F. (2d) 867 (C.A. 2). And it refers to the country of nativity, unless the alien after birth acquires a domicile in another foreign country. *Schenck v. Ward*, 80 F. (2d) 422 (C.A. 1); *Di Paolo v. Reimer*, 102 F. (2d) 40 (C.A. 2). And in the instant case it would envisage deportation to the country of nativity or nationality. *Karamoto v. Burnet*, 68 F. (2d) 278 (C.A. 9).

THE STATUTE IS CONSTITUTIONAL

Appellant Has No Vested Right to Remain in the United States.

Appellant argues that Congress has no constitutional right to treat as an entering alien one who, after acquiring residence here, journeys to Alaska and returns. His principal challenge appears to be bottomed on the premise that he will be denied substantive due process of law if the immigration restrictions interfere with his acceptance of employment or with the resumption of a residence in continental United States. This argument, however, ignores principles established by the Supreme Court in an unbroken chain of decisions from the *Chinese Exclusion Case*, 130 U.S. 581, and *Fong Yue Ting v. United States*, 149 U.S. 698, through *Shaughnessy v. Mezei*, 345 U.S. 206, and *Galvan v. Press*, 347 U.S. 22.

It cannot tenably be asserted, at this late date, that an alien has inherent rights which can vanquish the paramount power of Congress to inhibit his entry or to cut short his stay in the United States. On the contrary, a unanimous array of pronouncements has found that Congress has unqualified authority, as an incident of sovereignty, to specify which aliens shall

enter the United States and which shall be allowed to remain. Moreover, the Supreme Court invariably has insisted that such power is political in nature, touching the conduct of international affairs and national defense, and is immune from challenge in the courts. And it has always been held that a resident alien cannot demand a right to remain in the United States, if Congress in the exercise of its plenary power commands that he be excluded or expelled.¹⁵

It is clear, therefore, that admission for permanent residence confers no vested right to remain in this country. Thus a majority of the Supreme Court recently turned down a contention that "admission for permanent residence confers a 'vested right' on the alien . . . to remain within the country." *Harisiades v. Shaughnessy*, 342 U.S. 580, 584. In the prevailing opinion Justice Jackson observed, 342 U.S. at 586, 587-589, 591:

Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with

¹⁵The argument that the authority to regulate immigration is limited to the commerce power hardly can be supported. On the contrary, every holding of this Court, commencing with *The Chinese Exclusion Case*, *supra*, has insisted that it springs from national sovereignty and relates to the conduct of international affairs and national defense.

the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

* * *

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

* * *

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

* * *

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.

Justice Frankfurter's concurring opinion similarly commented, 342 U.S. at 596-597:

The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination

shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the powers of this Court to control.

The same concepts were underscored the same day in *Carlson v. Landon*, 342 U.S. 524, 534. Moreover, this doctrine can be buttressed by many declarations of the Supreme Court, voiced by some of its most celebrated members. Since the question has been so recently reexamined, we refer additionally only to the observations of Justice Gray in *Fong Yue Ting v. United States*, 149 U.S. 698, 711:

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . .

Justice Gray also pointed out that aliens residing in the United States:

are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and the protection of the laws, in regard to their rights of person and property, and to their civil and criminal responsibility. But they continue to be aliens, . . . and therefore remain subject to the power of Congress to expel them or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

And Judge Learned Hand recently described this concept with characteristic incisiveness in *Kaloudis Shaughnessy*, 180 F. (2d) 489, 490 (C.A. 2):

The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate .

2. The same considerations apply *a fortiori* to an alien who seeks admittance to the United States. Though some members of the Supreme Court have questioned whether the power of expulsion is unlimited, no one ever has doubted the absolute right of Congress to define the classes of aliens whose entry to the United States will be precluded. As the Supreme Court stated in *Knauff v. Shaughnessy*, 338 U.S. 537, 542:

At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as to the United States shall prescribe.

The unrestricted authority of Congress to bar aliens applying for entry likewise was endorsed in *Shaughnessy v. Mezei*, 345 U.S. 206, 210. Moreover,

in dissenting on other grounds, Justice Jackson stated, 345 U.S. at 222-233:

Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will.

The Supreme Court as late as May 24, 1954 in *Galvan v. Press*, supra, speaking through Mr. Justice Frankfurter, upheld the constitutionality of the Alien Registration Act of 1940, 54 Stat. 670, and reexamined the plenary power of Congress to legislate concerning aliens in light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress. The Court observed that much could be said for the view that the due process clause qualifies the scope of political discretion, heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens, if the Court were writing on a clean slate. Mr. Justice Frankfurter then pointed out that the slate was not clean and that there was not merely a page of history but a whole volume which pointed to the rule that the formulation of political policies with regard to aliens is exclusively entrusted to Congress, and that this rule has been about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our Government.

3. It is true that so long as an alien is permitted to remain in the United States he is protected against unfair impairments of his employment opportunities. *Yick Wo v. Hopkins*, 118 U.S. 356; *Truax v. Raich*, 239 U.S. 33; *Takahashi v. Fish and Game Commission*, 334 U.S. 410. But, as pointed out by Justice Jackson in the *Harisiades* case and by Mr. Justice Gray in *Fong Yue Ting v. United States*, these limited protections depend on continuance of his residence privileges in the United States and are subordinate to the sovereign power of Congress to withdraw such privileges at any time. Moreover, the immigration statute is not aimed, directly or indirectly, at any right or status of employment. Any impact on such employment opportunities is fortuitous and results from the happenstance that the prospective employee chances to be an alien. The execution of the immigration laws frequently curtails an alien's opportunities to accept employment in the United States. But the Constitution never has been regarded as affording protection against such a remote consequence of the exertion of sovereign power. See *American Communications Assn. v. Douds*, 339 U.S. 382, 390, 391, 404, 405, 409; *Hamilton v. Board of Regents*, 293 U.S. 245; *Korematsu v. United States*, 323 U.S. 214.

4. Nor can the appellant claim any advantage because he wishes to return to a permanent residence in the United States following a temporary absence. As we have pointed out, many decisions of the Supreme Court have held that an alien resident of the United States cannot demand a right to be readmitted to this country following a voluntary sojourn in a foreign country, no matter for how brief a period. In each of these holdings the Supreme Court emphasized that the sweep of Congressional authority to control the entry and residence of aliens was extensive enough to include measures directed against returning resident aliens. We refer again to *Volpe v. Smith*, 289 U.S. 422, 425; *Lem Moon Sing v. United States*, 158 U.S. 538; and *Lapina v. Williams*, 232 U.S. 78, 88. In the *Lapina* case the Court stated:

The authority over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. (Citing cases.)

The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation.

That returning lawful residents can be excluded by Congress was recently emphasized again by the Supreme Court in *Shaughnessy v. Mezei*, 345 U.S. 206, 213, where Justice Clark stated:

For the purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.

See also *The Chinese Exclusion Case*, 130 U.S. 581; *Polymeris v. Trudell*, 284 U.S. 279, 281.

It is thus established that the power to limit the entrance and residence of aliens is an attribute of sovereignty, essential to the national welfare and safety, and that even a resident alien cannot defeat the exercise of this plenary power by urging that he has a vested right to reenter or to remain in the United States. Since the power of Congress over the admittance and sojourn of aliens is so complete that it can bar reentry of an alien resident seeking to return from a temporary visit abroad (p. 25) and can require the expulsion of a long-time resident alien who has never left this country (p. 21), it is complete enough to permit Congress to treat a journey to Alaska as a departure from the United States and a return from that journey as an entry into the United States. This is a lesser limitation of residence privileges and necessarily must be included in the fullness of Congressional power in this area.

B. Congress has the power to treat a voyage to Alaska as equivalent to departure for a foreign country for the purposes of entry into continental United States.

It thus seems manifest that a resident alien cannot defeat the exercise of the plenary power to limit the entrance and residence of aliens by urging that he has a vested right to reenter or to remain in the United States. On what basis, then, can the appellant summon the aid of the Constitution? Apparently his plea is rooted in a feeling that the establishment of impediments to travel of aliens between a territory of the United States and the mainland somehow violates some precept of the Constitution.

We have pointed out that restrictions against admittance from other territories of the United States have been in force for over fifty years. This circumstance alone argues weightily against a charge of unconstitutionality. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 315. We mention also the deference due a solemn expression of the federal legislative process, and the reluctance of the Supreme Court to override it in the absence of the plainest showing of unconstitutionality. *American Communications Assn. v. Douds*, 339 U.S. 382; *Harisiades v. Shaughnessy* v, 342 U.S. 580. We note, too, the absence of any direct or indirect restraint in the Constitution

itself. These are time tested aids in appraising a statute and each of them tips the scale against the appellant.

The appellant's argument is, in essence, that Congress has no power to consider Alaska as different from a state of the United States and therefore cannot treat a voyage as a departure from the United States and an entry therefrom as a new entry into the United States. Alaska is, however, not a state of the United States; it is an organized territory of the United States. *Binns v. United States*, 194 U.S. 486, 491. And Alaska is not a part of the continental United States, but separated from it by a large expanse of land or water. These two factors, singly and together, establish that Alaska may be treated differently from the states of the United States for many purposes, including departure and entry under the immigration laws.

Viewed against the backdrop of our national domain, it is manifest, of course, that Alaska is not foreign territory. *American Railroad Co. v. Didrickson*, 227 U.S. 145; *DeLima v. Bidwell*, 182 U.S. 1. But this does not mean that it must be regarded as part of the United States for every purpose. It is well known that the term "United States" may have varying connotations. Thus in some usages it may

describe the sovereign power of our nation; in others it "may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671-2. See 1 Willoughby, *Constitutional Law* (2d Ed., 1929), 475; Langdell, *The Status of Our New Territories*, 12 Harv. L.R. 365 (1899). Whether Alaska is to be regarded as part of the United States within the contemplation of a statute or of the Constitution depends on the context. Cf. *Mullancy v. Anderson*, 342 U.S. 415; *Alaska v. Troy*, 258 U.S. 101.

In the *Insular Cases* and in subsequent decisions, the Supreme Court has evolved practical formulas for assessing the status of the inhabitants of our non-contiguous possessions. See 1 Willoughby, *Constitutional Law*, 479 et seq.; *Alaska and Hawaii: From Territoriality to Statehood*, 38 Cal. L.R. 273 (1950); Irion, *Areas Under the Jurisdiction of the United States*, 17 George Wash. L.R. 301 (1949). An important facet of these territorial doctrines is that insofar as the Constitution safeguards the "fundamental rights of the individual", and thus inhibits any action by federal officers, it applies in the United States and all its territories, whether incorporated or unincorporated. *Farrington v. Tokushige*, 273 U.S. 284, 299;

Hawaii v. Mankichi, 190 U.S. 197, 218; *Duncan v. Kahanamoku*, 327 U.S. 304; *Kepner v. United States*, 195 U.S. 100; *Soto v. United States*, 273 Fed. 628 (C.A. 3). But we are not aware of any "fundamental" right assuring to aliens in Alaska unlimited access to continental United States. On the contrary, as we have pointed out, the entire course of American constitutional doctrine negates the existence of any such absolute right of entry or residence.

Moreover, we know of no constitutional prohibition circumscribing the authority of Congress to impose restrictions on the travel of aliens between a noncontiguous territory and the mainland. Indeed, the only provision of the Constitution in which territories are mentioned in Article IV, Section 3, Clause 2, which specifies:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

From the breadth of this language, it seems overwhelmingly evident that the Framers intended to bestow upon Congress complete power to legislate¹⁶

¹⁶The constitutional reference to making regulations patently include laws. *Dorr v. United States*, 195 U.S. 38, 146.

for the territories.¹⁷ And the Supreme Court frequently has characterized such legislative power over the territories as plenary.

That Congress has ample authority to make special dispensations for commerce and travel to and from Alaska is the direct holding of *Alaska v. Troy*, 258 U.S. 101. There a statute giving preference to the ports of the states over those of Alaska was attacked "upon the ground that the regulation of commerce prescribed therein gives a preference to ports of the Pacific Coast States over those of Alaska, contrary to Sec. 9, Art. I, Federal Constitution — 'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another'." 258 U.S. at 109. The challenge was rejected unanimously, and the Court stated, 258 U.S. at 111:

The appellants insist that "State" in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution and as generally used therein clearly excludes a "Territory". To justify the

¹⁷Among the supporting evidence is the fact that the Commerce Clause, Art. 1, Sec. 8, Cl. 3, confers authority on Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," but does not mention commerce with territories. The obvious implication is that complete power is given in the Territorial Clause

broad meaning now suggested would require considerations more cogent than any which have been suggested. *Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States.* And we can find nothing in the Constitution itself or its history which compels the conclusion that it was intended to deprive Congress of power so to act. (Emphasis added.)

Also significant is *Binns v. United States*, 194 U.S. 486, 491. In that case a license tax applicable only to Alaska was upheld. The Court found the constitutional provision for uniformity of taxes throughout the United States not applicable to Alaska, and observed:

Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution . . .

In *Cincinnati Soap Co. v. United States*, 301 U.S. 308, a tax law applicable specially to the Philippine Islands was sustained. The Court found that even if a like tax applicable to a state would be invalid, it does not follow "that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the Federal Constitution otherwise requires, is supreme and independent." 301 U.S. at 17. The Court then declared, *id.* 323.

In dealing with the territories, possessions and dependencies of the United States, this nation

has all the powers of other sovereign nations and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.

And in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, the Court upheld the propriety of a tax imposed by a state upon imports from the Philippine Islands and found that under certain circumstances it was entirely proper to regard territory of the United States as equivalent to a foreign country. Again the Court pointed out, 324 U.S. at 674, that in legislating for the territories,

Congress is not subject to the same constitutional limitations, as when it is legislating for the United States.

See also *Inter-Island Steam Nav. Co. v. Hawaii*, 300 U.S. 306; *Downes v. Bidwell*, 182 U.S. 244.

These authorities establish decisively, we believe, that complete power resides in Congress to deal specially with travel and commerce from Alaska.¹⁸

¹⁸In addition to the examples cited in the above cases there have been a number of other instances, outside of immigration laws, of special legislative dispensations in regard to Alaska. See comment, *Alaska and Hawaii; From Territoriality to Statehood*, 38 Cal. L.R. 273, 282 (1950); Act of April 29, 1902, 32 Stat. 172; cf. 48 U.S.C. 1486.

Moreover, the special situation of a noncontiguous territory like Alaska generates an additional source of legislative power. For in journeying from Alaska an alien must leave the territorial limits of the United States. Since he thereafter seeks to enter from outside the United States we believe his situation clearly falls within the zone of sovereign legislative power to restrict entries from outside the United States. The enactment of Section 212(d)(7) was therefore fully within the competence of Congress.

Even if we were to assume that power to deal with travel to a territory of the United States is subject to the due process clause it seems to us that there clearly is a reasonable basis for treating Alaska and other noncontiguous territory as different from the continental United States for the purpose of the immigration laws. In enacting this statute Congress doubtless took into account the special problems posed by Alaska's size, its scant population, its proximity to Soviet Siberia, the difficulty of establishing adequate controls to prevent the movement of spies, saboteurs and subversives, the distances to be traversed across foreign territory and waters in traveling from Alaska to continental United States, and the need for providing a screening process at the ports of entry in the United States in order to close an avenue

affording the possibility of easy entrance for subversives and other undesirables.¹⁹

Even citizens of the United States cannot claim an unlimited right of free movement which can nullify precautionary measures adopted by the federal government in fulfilling legitimate national needs. Thus, quarantine laws safeguarding the public health are an obvious example of legislation properly restricting free movement.²⁰ Another example is the selective service legislation enacted during time of war or danger.²¹ Also sustained have been extreme measures limiting the mobility of West Coast residents of Japanese ancestry, citizens and aliens, under war-time conditions of peril.²² Federal mandates for the registration of aliens likewise are valid,²³ as are summary procedures for the internment and removal

¹⁹See H. Rep. 675, 83rd Cong., 1st Sess., pp. 6, 14 which refers to the fact that from Alaska, "Across narrow strip of water, Siberia can be seen with the naked eye."

²⁰*Thorton v. United States*, 271 U.S. 414; *Mintz v. Baldwin*, 289 U.S. 346; *Compagnie Francaise v. Louisiana State Board of Health*, 186 U.S. 380.

²¹*Selective Draft Law Cases*, 245 U.S. 366; *United States v. Henderson*, 180 F (2d) 711 (C.A. 7), certiorari denied, 339 U.S. 963.

²²*Hirabayashi v. United States*, 320 U.S. 81; *Korematsu v. United States*, 323 U.S. 214.

alien enemies.²⁴ Additional restrictions limit the movement of alien enemies during wartime,²⁵ and other edicts sanction restricted mobility of citizens and aliens during time of war or national emergency.²⁶

These examples are displayed merely to illustrate the wide expanse of federal power. They demonstrate decisively, we believe, that under exigent circumstances, arising out of a national need, even some restrictions upon travel between states might well be deemed justified. But this question is not now before the Court. In view of the plenary power of Congress over the territories, and its unqualified power to regulate the entry and expulsion of aliens, Congress clearly has the power to determine that a voyage to Alaska shall be deemed a departure from the United States for the purpose of the immigration laws.

Hines v. Davidowitz, 312 U.S. 52; *Fong Yue Ting v. United States*, 149 U.S. 698; *United States v. Franklin*, 188 F. (2d) 182 (C.A. 7); *Gancy v. United States*, 149 F. (2d) 788 (C.A. 8) certiorari denied, 36 U.S. 767.

Ludecke v. Watkins, 335 U.S. 160.

Presidential Proclamations 2525, 2526, 2527, 2537, and 2563, 6 F. R. 6321, 6323, 6324, 7 F. R. 329, 5535.

Presidential Proclamations 2523, 6 F. R. 5821; and 104, 18 F. R. 489.

III

APPELLANT WAS NOT DENIED DUE PROCES

The appellee agrees with the general legal principles set forth at page 22 of the appellant's brief to the effect that the appellant is entitled to due process of law which encompasses a reasonable notice of the evidence he is required to meet and a right to be represented by counsel during a hearing which determines his status under the immigration laws. Appellant argues in his brief that he was not accorded due process in that: No notice of the charges was given him; that the charges were not explained to him; that his rights were not explained to him and that he was not furnished with an interpreter.

It should be noted that in appellant's petition below, the only reference to a lack of due process was the allegation that petitioner was not afforded opportunity to obtain counsel or an interpreter. Apparently the additional charges enumerated, supra, which were strictly after-thoughts, added in the brief below, are now the only grounds urged by appellant in this court as a denial of due process.

To refute the charges made will involve a factual review of the administrative proceedings conducted by the Immigration Service. The record establishes that when appellant was initially interviewed August

53 (R. Ex. A, p. 1), he was advised by the Immigration officer that the Immigration officer desired to obtain a statement from him regarding his right to enter and remain in the United States and to enter the United States from Alaska. He was further advised that any statement should be voluntary and warned that such a statement could be used against him. The appellant, without hesitation, stated that he was willing to answer questions under oath.

The officer asked him if he could speak and understand English and he said, "Yes, I can speak a little bit." The officer then asked him if he had understood and he answered, "Yes." The officer then advised him, "In the event that you do not understand at any time in this proceeding will you please tell me right away in order that I can ask you the question in such a way that you will understand?" and the appellant stated that he would. There then followed several pages of questions and answers during which it did not appear from the transcription that there was any misunderstanding between appellant and the Immigration officer. Appellant was then advised that the question of his admissibility would be referred to a Special Inquiry Officer and that a formal notice of such referral would be given to him, at which time he would be advised with respect to representation before such officer (R. Ex. A, p. 5). He

was then asked if he understood that, appellant replied, "Yes."

At the end of this interview he was asked:

"Q. Have you understood all of these questions?" and he replied, "Yes." (R. Ex. A, p. 6).

He was thereafter served with Immigration Form 1-122 by this same officer, Jess L. Giles (R. Ex. B, Ex. 1). This notice stated:

"You are hereby notified that since you do not appear to me to be clearly and beyond a doubt entitled to enter the United States, you are detained for further examination by a Special Inquiry Officer to determine whether you are entitled to enter the United States under the provisions of the Immigration and Nationality Act. During such examination you have a right to be represented by counsel and to have a friend or relative present."

This notice was then read to him and he stated that he understood it. (R. Ex. C.).

Appellant was then released from custody for a period of eleven days. He was given ample opportunity to obtain the services of an attorney.

When he appeared for hearing on August 14, 1953, the Special Inquiry Officer asked him if he understood the English language. He replied, "Just a little bit." (R. Ex. B. p. 1). The Special Inquiry

ficer than asked him, "Do you understand me sufficiently well to know what I am talking about?" He replied, "Yes". He was then advised (R. Ex. p. 2):

"At this hearing you may be represented by counsel of your own choice and at your own expense, which counsel may be an attorney at law or any other person qualified to practice before this Service and the Board. Do you wish to be so represented?"

Appellant answered, "No". He was then addressed:

"You are advised that at this hearing you may have present a relative or friend who, if testifying as a witness in your behalf, must first complete his testimony before being permitted to remain at this hearing. Do you wish to have a relative or friend present?"

and the appellant replied, "No".

Thereafter followed six pages of testimony during which the Special Inquiry Officer frequently interrupted to inquire if the appellant understood and stated that he did understand. There is nothing in the record to indicate that he did not understand what was transpiring. At the conclusion of the hearing the Special Inquiry Officer stated (R. Ex. B, 7):

"Do you have anything to say in your own behalf

as to why you should not be refused permission to enter the United States?"

The appellant responded:

"I have nothing to say."

The Special Inquiry Officer then advised him that he would orally announce his decision in the case. At this juncture appellant stated that he understood. After delivering the decision, which is included in the record of hearing (R. Ex. B, Ex. 1) the appellant was asked whether he understood the decision and order and he stated that he did.

The appellant was thereafter advised with respect to his right to appeal and he stated that he wished to appeal the decision and also was again advised with respect to his right to submit a brief with his appeal. Two days later he was represented by counsel who was given an opportunity to submit a brief on appeal to the Board of Immigration Appeals.

It is evident from a review of the above excerpts that appellant was accorded due process. In fact, as was noted below, by District Judge John C. Bowler in his oral opinion (R. 9) the hearing examiner afforded appellant meticulous due process.

Prior to an examination of the exact contentions made by appellant, it should be noted in passing that the instant proceeding is one for exclusion and under Section 291, Immigration and Nationality Act of 1952, 68 Stat., 234, the burden is on appellant to establish that he does not fall within one of the grounds for exclusion.

NOTICE

Appellant on page 32 of his brief admits the receipt by him of form I-122 (Respondent's Exhibit B (R. Ex. A-1 to Ex B)) being the notice of charges, but states that it was not explained to him. Respondent's Exhibit C (R. Ex. C) shows that the notice was read to appellant and that he said he understood it. This more formal notification was in addition to the initial advice that appellant was to give a statement regarding his right to enter from Alaska (R. Ex. A, p. 1).

UNDERSTANDING

In the initial interview, August 6th, the appellant stated frequently, in answer to the Examination Officer's questions, that he understood (R. Ex. A, p. 1 and 6). That officer also stated that he had no difficulty in making himself understood (R. Ex. A, p. 1). It is not surprising that appellant could under-

stand the English language, as the record shows the appellant had spent some 26 years in this country.

Appellant makes much of his answer, "Just a little bit" to the question "Do you understand the English language?" (R. Ex. B, p. 1). However, the answer is torn completely out of context. This hearing and the prior hearing taken in their entirety amply show his understanding and the lack of need for an interpreter.

RIGHT TO COUNSEL

Appellant was advised of his right to counsel on August 6, 1953 (R. Ex. A, p. 5) and thereafter had ten days to procure same. On August 17, 1953, appellant expressly stated that he did not desire to be represented (R. Ex. B. p. 2). Such a statement amounts to a legal waiver of the right to counsel. *U. S. ex v. Mustafa v. Pederson*, 207 F. (2d) 112 (C.A. 7); *U. S. v. Burmaster*, 24 F. (2d) 57 (C.A. 8); *Di Ciantano v. Uhl*, 6 F. Supp. 791 (D.C. N.Y.).

Even if appellant had not been informed of his right to counsel or the same had been denied him, there could be no prejudicial error since all the facts brought out at the hearing were admitted to be true. This Court in *Sumio Madokaro v. Del Guercio*, 18 F. (2d) 164, cert. denied 322 U.S., 764, held that

ere all the facts elicited at the hearing relevant to
 ortation are admitted to be true, failure to have
 nsel, if error, like other errors, may not be pre-
 icial.

It should be noted that appellant was represent-
 by counsel for purposes of appeal and that at no
 e subsequent to the decision of the Inquiry Officer
 s any request made for the consideration of any
 itional factual matter or for a rehearing.

IV

THE APPELLANT IS AN ALIEN

Appellant advances the argument that he is not
 v an alien and for this reason the deportation pro-
 dling must fail for lack of jurisdiction. It is ad-
 ed that appellant was a national of the United
 tes residing in this country, on July 4, 1946, the
 al effective date of the Philippine Independence
 of 1934, 48 Stat. 456. However, appellant denies
 application of this act to change the status of his
 dence in the United States subsequent to July
 1946.

Appellant's argument is not novel, similar ques-
 as of status have been decided adversely to this
 ument, in three decisions handed down by this
 rt. *Cabebe v. Acheson*, 183 F. (2d) 796; *Man-*

gaoang v. Boyd, 205 F. (2d) 553 and *Gonzales v. Barber*, 207 F. (2d) 398, Rev. 347 U.S. 637, on other grounds. In the Cabebe case this Court examined in some detail the statutory development of Philippine Independence and the attendant treatment of person rights. The Court noted that the Philippine Independence Act supra, provided that citizens of the Philippines who are not citizens of the United States shall be considered as if they were aliens, and held that this provision was also intended to apply to Filipino residents in the United States on July 4, 1946.

Appellant, considering the interpretation of the above act by this Court, now apparently challenging the constitutionality of this statute as interpreted in the above decisions. Appellant's argument is based on a very tenuous assumption that appellant's status prior to July 4, 1946, as a national of the United States had to be either a status of citizenship or alienage. The Cabebe opinion, supra, appears to adequately dispose of this problem when at page 797 it is said:

"Accordingly, it was realized that while all citizens of the United States were nationals, not all nationals were citizens. A hybrid status appeared, the so-called 'non-citizen national.'"

Again, the position taken by the 8th Circuit in the case of *Gancy v. U. S.*, 149 F. (2d) 788, cert.

Id., 326 U.S. 767, which held that a Filipino resident in the continental United States was subject to the Alien Registration Act of 1940, shows the inconsistency in appellant's contention that his status was identical to that of citizenship. That Court at page stated:

"Manifestly, the natives of the Philippine Islands did not become citizens of the United States by virtue of the Treaty of Paris, and unless Congress, which has the sole power to provide for naturalization has conferred citizenship upon them, it would seem clear that they must still be aliens whatever other rights or privileges as American nationals they may enjoy."

Appellant is admittedly not a native born citizen, nor has he applied for naturalization; therefore, his status as a citizen can only be argued to arise through some Congressional enactment having automatic application to persons in appellant's position. Congress has the sole power to provide for naturalization, *Gancy v. U. S.* supra.

Appellant can point to no such Congressional expression, and in fact the only provision pertinent to his inquiry is contained in The Philippine Independent Act of 1934, supra, wherein it was expressly declared that Filipinos who were not already citizens of the United States should, for purposes of immigration acts, be considered aliens.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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No. 14522.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Appellee.

On Appeal From the United States District Court for the Western District of Washington, Northern Division.

Honorable John C. Bowen, Judge.

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Honorable John C. Bowen, Judge.

REPLY BRIEF FOR APPELLANT.

I.

The Legislative History and Judicial Interpretation of Section 212(d)(7) Precludes Its Application to Mainland-Resident Aliens, Such as Appellant, Returning From a Business Sojourn to Alaska.

Appellee contends that Alaska was converted by Section 212(d)(7) of the Immigration Act of 1952¹ into a "foreign place," and that therefore, when appellant left that

¹Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. 1182(d)(7), hereinafter referred to as "the Act," or the "Act of 1952."

territory, he “departed a foreign port.” *A priori*, according to appellee, appellant’s return to his home in the United States was, for immigration purposes, a new entry, and hence, appellant is excludable.

Although the Government’s argument is elegantly fitted in crusty nautical metaphor, unhappily the premises upon which it is anchored proceeds from a misunderstanding of the legislative history, Congressional intent and judicial interpretation of Section 212(d)(7), and its predecessor.

For many years, migration to American possessions, particularly Hawaii, was encouraged as a matter of official policy.² Immigration laws and their enforcement in those areas were relaxed as a measure of migratory inducement. It soon became apparent, however, that no sooner had the alien gained lawful admission to the Islands than he would use this device as a means of entering the mainland.³ To forestall this evasion of Congressional intent, this Court,

²Senate Report 1515, 81st Cong., 2d Sess., at p. 671.

³*Savoretti v. Voiler*, 214 F. 2d 425, 428.

With respect to the 1917 Immigration Act, predecessor to the 1952 Act (which modifies the 1917 Act, by merely adding Alaska to insular possessions), the following is noteworthy:

On March 19, 1914, the Secretary of Labor, W. B. Wilson, suggested an amendment to H. R. 6060, which later became the 1917 Immigration Act. As originally drafted, Section 2 of the 1917 Act did not contain the words “or any insular possession of the United States” (following the words Canal Zone). This addition was suggested by the Secretary of Labor with the following comment (S. Doc. 451, 63d Cong., 2d Sess.):

“The coming of aliens coastwise to the mainland from the insular possessions—particularly of Asiatic aliens from the Philippine Islands—has become a matter of grave concern. It is believed that the simple change in the law here suggested would provide a remedy as under the law so amended, the insular possessions could not be used as a stepping-stone to the mainland by aliens of classes whose entry to the mainland would be regarded by all as undesirable, but whose admission to the

in *Healy v. Backus*, 221 Fed. 358, devised the so-called conditional entry theory. That case involved the right of the Immigration Commissioner to “adopt rules for an alien’s admission to the insular possessions, and then require further examination, if he proceeded to the mainland, as a test for his right to enter the continent.” (P. 363.) Holding in the affirmative, this court reasoned that:

“aliens (might) be likely to become public charges on the mainland when such would not be the case with them were they to remain in the insular possessions . . .” (P. 363.)

Subsequently, in its 1917 Immigration Act,⁴ Congress incorporated the rationale espoused in *Healy v. Backus* (see Footnote 3). Alaska, however, was regarded as the Continental United States rather than, like Hawaii, as an insular possession. (Appellee’s Br. p. 15.) Its inclusion within Section 212(d)(7) of the Act, therefore, appears to have been intended as a sop to Hawaiian delegates who

Philippines, for instance, might not be considered inadmissible by the authorities in charge of the enforcement of the Immigration laws in those Islands.”

The suggestion of the Secretary of Labor was approved, for the following appears in Senate Report 355, 63rd Congress, 2d Session:

“On page 2, line 3, following the words ‘the Canal Zone,’ insert ‘or any insular possession of the United States, *so as to make it perfectly clear that the admission of an alien to the insular possessions does not privilege such aliens to come to the mainland without examination.*’ The necessity for the provision is the fact that aliens are using the insular territory (particularly the Philippines and Hawaii) as ‘stepping-stones’ to the continent. (See letter of Secretary of Labor, S. Doc. 451, pp. 3-4.)” (Italics supplied.)

⁴For the convenience of the court, the pertinent provisions of Section 1 of the Immigration Act of 1917, and its counterpart in the Immigration and Nationality Act of 1952, Section 212(d)(7), are set out in comparative form in the appendix.

protested that the proposed act discriminated against aliens *residing permanently in Hawaii*.

Nowhere is this more clear than in the colloquy between Delegate Farrington of Hawaii, and Representative Walter, co-author of the 1952 Act. A careful reading of this debate (cited in Appellee's Br. at pp. 17-19) reveals that Farrington and Walter were *not* discussing *mainland-resident* aliens, but rather aliens residing in Hawaii who were attempting to gain admission here. Indeed, Farrington was not interested in aliens who lived on the Continent. And Representative Walter appears to have been only concerned about aliens "who have never been properly screened." (98 Cong. Rec. 4406.) Moreover, Congressman Walter's reply to Delegate Farrington was merely a reiteration of the rule in *Healy v. Backus*, *supra*.

It is equally obvious, from the report accompanying the final version of the bill,⁵ that Congress had no motive for including Alaska other than to equate that territory with Hawaii in the context of *Healy v. Backus*, for at page 14 the report reads:

"Section 212(d)(7) of the bill continues in effect the *special procedures* applicable to aliens who travel from the land zone, territories, or outlying possessions to the Continental United States or any other territory under the jurisdiction of the United States. Under the bill *such procedures* will also be applicable to aliens traveling from Alaska to Continental United States." (Italics supplied.)⁶

⁵S. Rep. 1137, 82d Cong., 2d Sess.

⁶H. Rep. 1365, 82d Cong., 2d Sess., p. 53, is substantially in accord.

What *special procedure* is Congress alluding to? Manifestly, the practice summed up in S. Rep. 1515,⁷ at p. 658:

“Generally aliens who have been lawfully admitted to any of our insular possessions (except the Canal Zone) are not admissible to the continental United States (which includes Alaska for control purposes) or any other territory subject to the jurisdiction of the United States, unless such aliens can satisfy the Immigration and Naturalization Service that they are not inadmissible under the exclusionary provisions of the Act of 1917. Such aliens are thus considered as proceeding from a foreign area to the United States as far as immigration provisions of the Act of 1917 are concerned. . . . *Alien residents of the continental United States are not subject to the exclusionary provisions of the Act of 1917 when traveling from the continental United States to any of our insular possessions and return.*” (Italics supplied.)

This interpretation was attacked by the Government as without “support in any statute administrative construction, or decision, and appears to be erroneous” (Appellee’s Br. p. 24, Footnote 10).⁸ Nevertheless, the report makes

⁷In the late forties, the Senate appropriated \$335,000 for a “full and complete investigation of our entire immigration service.” The Immigration Service cooperated fully, and the committee received, among other things, memoranda from various immigration officers regarding their practice and procedure (S. Rep. 1515, 81st Cong., 2d Sess., pp. 1-3). The result of this project was the massive, 925 page Senate Report 1515 now being cited.

⁸Be that as it may, the report nonetheless reflects Congressional opinion as to what the law and practice was prior to the 1952 Act. It was *this* impression that Congress believed was “continued in effect” by Section 212(d)(7) of the Act. See: S. Rep. 1137, 82d Cong., 2d Sess., p. 14, and H. Rep. 1365, 82d Cong., 2d Sess., p. 53. It was *this* thought also which prompted Representative

further reference to these "special procedures" at page 660:

"An alien resident of the United States, who visits Hawaii and wishes to return to the mainland, is issued a form which shows the port and date of original arrival in the United States, *and the claimed status*. He is not required to present a passport or visa when traveling between the continental United States and any outlying insular possession of the United States or when traveling from one insular possession to another."⁹

Walter, co-author of the Act, to in effect remark in debate in defense of this provision that permanent residents of the United States "can come to the mainland." See: App. Op. Br. p. 22.

The administrative decision, *Matter of O'D*, 3 I. & N. Dec. 632, is correctly cited by appellee as a contrary interpretation. Yet, this interpretation does not mitigate the significance of the Congressional version for it appears to have been adopted only after a lapse of 32 years from passage of the 1917 Act, and moreover, the decision apparently was not communicated to the Senate Committee when it was investigating all phases of immigration practice (see: footnote 7, *supra*), nor apparently, to the President's Commission on Immigration and Naturalization (see footnotes 10 and 11, *supra*). Certainly no mention of it is made in any of the reports regarding the 1952 Immigration Act.

It is interesting to note also, that in the Government's brief in *Brownell v. Rubinstein*, October Term, 1953, No. 300, a different attitude to S. Rep. 1515 is displayed. It is there stated:

"In the comprehensive 1950 Report of the Senate Committee on the Judiciary (Senate Report 1515, 81st Cong., 2nd Sess.) entitled 'the Immigration and Naturalization System of the United States' and *which embodies the congressional understanding of existing law upon which the 1952 Act was predicated*, it was stated . . ." (Italics supplied.) (Pet. Br. p. 35; see also, pp. 8, 19 and 33.)

⁹The report cites former 8 C. F. R. 176-202(g), 12 F. R. 9987, 9988, regarding local documents. Similar, although not identical, provisions appear in 8 C. F. R. 211.2(c), 17 F. R. 11483.

It is noteworthy, too, that the President's Commission on Immigration and Naturalization¹⁰ at no point suggests that the 1952 Act was meant to apply to the mainland-resident aliens visiting Hawaii or Alaska. Rather, in fact, the Commission thought, like Congress, that the 1952 Immigration Act:

“continued this policy and *extended it to Alaska*, which was not previously included,” (Commission Report, at p. 183),

and that:

“This discrimination against the *inhabitants of the possessions* of the United States seem to be unsound.” (Commission Report, p. 184.)¹¹

Not only, then, is there *no* explicit statement anywhere in the debates or Committee reports equating mainland-resident aliens to those living on our territories and possessions, but the Congressional discussion, and indeed, the very Government officials responsible for the enforcement of the Immigration program, support the view of Senate Report 1515 (p. 658) that Section 212(d)(7) of the Act does not apply to aliens residing on the mainland.

¹⁰A Commission was appointed by the President on September 4, 1952, pursuant to Executive Order 10392 to study and report on the immigration and naturalization laws and policies of the United States. Its findings and recommendations are contained in the 319 page report entitled: *Whom We Shall Welcome*, from which the next two quotations cited in the main brief are taken.

¹¹In this connection, it is interesting to observe that some of the seven members constituting the Commission are or were intimately associated with the enforcement of the 1917 Act and the 1952 Act. For example, Thomas G. Finucane is Chairman of the Board of Immigration Appeals; Earl G. Harrison is a former Immigration Commissioner; Philip B. Perlman, former Solicitor General; and Adrian S. Fisher was formerly counsel to the Secretary of State.

Appellee seeks to root the third peduncle of its argument in the judicial concept of "entry." Appellee contends that whenever an alien leaves the United States, he has no vested right to re-enter, and some cases are cited purporting to support this proposition. But notably, these authorities deal either with aliens entering the United States for the first time,¹² or with aliens returning to the United States from a visit abroad—*i.e.*,¹³ from a place outside the (statutorily defined) United States. (*Cf. Claussen v. Day*, 279 U. S. 398, 401.)

The "original entry" (or "conditional entry") cases cited in Footnote 12, *supra*, simply effectuate the express legislative policy of obviating the use of American possessions by aliens as "stepping stones" toward gaining lawful admission to the mainland. (See: *Savoretti v. Voiler*, 214 F. 2d 425, 428.) Alien residents of American possessions and territories making their initial entry into the Continental United States must first undergo a pre-entry screening. On the other hand, the so-called "re-entry" cases, cited in Footnote 13, *supra*, have dealt exclusively with aliens departing from the United States for foreign countries (usually their homeland), and seeking thereafter to

¹²*Karamoto v. Burnett*, 68 F. 2d 278; *Matsuda v. Burnett*, 68 F. 2d 272.

¹³*The Chinese Exclusion Case*, 130 U. S. 581; *Lem Moon Sing v. United States*, 158 U. S. 538; *Lapina v. Williams*, 232 U. S. 78; *Lewis v. Frick*, 233 U. S. 291; *Claussen v. Day*, 279 U. S. 398; *Polymeris v. Truedell*, 284 U. S. 279; *Stapf v. Corsi*, 287 U. S. 129; *Volpe v. Smith*, 289 U. S. 422; *Shaughnessy v. Mezei*, 345 U. S. 206; *Sugimoto v. Nagle*, 38 F. 2d 307; *Schlimmgen v. Jordan*, 164 F. 2d 633; *Schoeps v. Carmichael*, 177 F. 2d 391. Note: Cases such as *Fong Yue Ting v. United States*, 149 U. S. 698, and *Kaloudis v. Shaughnessy*, 180 F. 2d 489, go to the questions of the power of Congress to exclude or expel aliens rather than attempting to interpret or define the term "entry."

return here. Neither of these situations is up for consideration now. Indeed, on the few occasions when the instant question has been submitted for judicial determination, the courts have held, with but one (distinguishable) exception,¹⁴ that alien residents returning from an American possession have *not* made an "entry."¹⁵

But, even if the appellee is correct in his contention generally, the courts of this circuit have carved out a significant and pertinent exception. In those instances where the alien's occupation carries him without the boundaries of the Continental United States, his return to the mainland while in pursuit of that employment has invariably been regarded as *not* an entry within the meaning of the deportation and exclusion laws. (*Weedin v. Okada* (C. C. A. 9), 2 F. 2d 321; *Petition of Hersvik* (D. C. S. D. Cal.), 1 F. 2d 449; *Ex parte Nagata* (D. C. S. D. Cal.), 11 F. 2d 178; *Ex parte Saito* (D. C. W. D. Wash.), 18 F. 2d 116.) Moreover, this view has apparently been accepted by the Supreme Court (*Chew v. Colding*, 344 U. S. 590), as well as by the Fifth Circuit (*Savoretti v. Voiler*, 214 F. 2d 425), and the District Court for the District of Columbia (*Taran v. Brownell*, No. 3494-53 (Nov. 24, 1954)).

¹⁴*ILWU v. Boyd*, 111 Fed. Supp. 802; complaint ordered dismissed by the Supreme Court for failure to present a justiciable controversy (347 U. S. 222). *Note*: This case was heard by a three-judge District Court, but none of the legislative history of Section 112(d)(7) was presented to that court.

¹⁵*Savoretti v. Voiler* (C. C. A. 5), 214 F. 2d 425; *Taran v. Brownell* (D. C. D. C.), No. 3494-53 (Nov. 24, 1953). *Compare also*: *Delgadillo v. Carmichael*, 332 U. S. 388; *Kwong Hai Chew v. Colding*, 344 U. S. 590; *Carmichael v. Delaney*, 170 F. 2d 239; *DiPasquale v. Karmuth*, 158 F. 2d 878.

In any event, the courts seemingly have now called a halt to the "propagation of (the) extreme view"¹⁶ at precisely the posture in which appellant's case is poised here. (*Savoretti v. Voiler* (C. C. A. 5), 214 F. 2d 425; *Taran v. Brownell* (D. C. D. C.), No. 3493-53 (Nov. 24, 1953).) Both of these cases involved mainland-resident aliens returning to the States after visits to Puerto Rico.¹⁷ In both instances, the court was faced with a statutory construction problem almost identical to the one presented here.¹⁸ The Government, of course, argued then (in the *Voiler* case, at least), as it does now, that the language of the Act ought to be given its ordinary, everyday sense (*Barber v. Gonzales*, 347 U. S. at 640); that the words "leave" and "come" (in the 1917 Act) should be construed as applicable to mainland-resident aliens journeying between the Continent and American territories.¹⁹

¹⁶*Carmichael v. Delaney*, 170 F. 2d 239, 242.

¹⁷In both cases, the alien had been convicted of crimes involving moral turpitude, and was not otherwise deportable because his convictions post-dated his original entry by more than five years. (Immigration Act of 1917, Sec. 19.)

¹⁸See: *Appendix* for a comparative view of the two statutory sections herein involved. Additionally, Section 19 of the 1917 Act states that the deportation provisions of that section:

"shall also apply to the cases of aliens who *come* to the mainland of the United States from *insular possessions thereof*.
 . . ."

It is readily seen that the critical terms "leave" and "come" or "enter" were of as much significance in those cases as they are in the instant one. Moreover, an examination of the briefs filed by appellee and appellant in the *Voiler* case reveals that both parties raised substantially the same points and the same issues as are here in controversy (the nationality point excepted), including the contention that the Congressional impression of the law is "erroneous." (Govt. Br. in *Voiler*, at pp. 8-9.)

¹⁹Government's Brief in *Savoretti v. Voiler*, *supra*, at pp. 7-13.

But both courts flatly rejected this interpretation, reasoning that *Voiler* and *Taran*, in traveling to Puerto Rico, by *definition* never left the United States, and therefore could not have entered the United States within the meaning of the Act.²⁰ See also: *Gonzales v. Williams*, 192 U. S. 1, at p. 16, holding that in traveling from Puerto Rico to the United States, "Gonzales was not a passenger from a foreign port . . .;" and, *Air Transportation Association of America v. Brownell*, 124 Fed. Supp. 909, where:

"The Court is of the opinion that there is no basis for treating ports in Hawaii, Alaska and Puerto Rico as foreign ports. They are part of the United States of America." (P. 910.)

Yet, the very most that the Government can properly say about Section 212(d)(7), in light of an apparent conflict in its meaning, is that it is ambiguous and uncertain; its exact requirement is left in doubt.^{20a} In such circumstances, deportation statutes deserve strict construction for "as a practical matter they may inflict the equivalent of banishment or exile!"²¹ (*Barber v. Gonzales*, 347

²⁰Accord: *Weedin v. Okada* (C. C. A. 9), 2 F. 2d 321; *Petition of Hersvik* (D. C. S. D. Cal.), 1 F. 2d 449; *Ex parte Nagata* (D. C. S. D. Cal.), 11 F. 2d 178; *Ex parte Saito* (D. C. W. D. Wash.), 18 F. 2d 116.

^{20a}Unfortunately, the 1952 Immigration Act lacks the preciseness that legislation should have. Professor Max Rheinstein of the Chicago University Law School contends that "it is an abomination on the English language * * * worse than the Code of Internal Revenue." Former Attorney General McGranery testified that the Act contained numerous ambiguities. *Hearings before the President's Commission on Immigration and Naturalization* (1952), pp. 774, 1350.

²¹The fact that this is an exclusion proceeding is immaterial since the effect is the same. (*Carmichael v. Delaney*, 170 F. 2d 239, 245.)

U. S. 637; *Galvan v. Press*, 347 U. S. 522; *Fong Haw Tan v. Phelan*, 333 U. S. 6; *Delgadillo v. Carmichael*, 332 U. S. 388.) Therefore, "in the absence of explicit language showing a contrary Congressional intent, we must give technical words in deportation statutes their usual technical meaning." (*Barber v. Gonzales*, *supra*, at p. 643.)

As a matter of fact, this very court has shown no hesitancy in obviating harsh, punitive consequences ensuing from the kind of strained interpretation of "entry" as that advocated by the Government here. In *Gonzales v. Barber*, 207 F. 2d 398, at p. 402, this court "recognized the fact that (its) definition of the word 'entry' (was) not its plain and obvious meaning, but . . . also recognized that the word had become a word of art." This was also the construction adopted by the Supreme Court (*Barber v. Gonzales*, 347 U. S. 637);²² and which was cited with approval by the Fifth Circuit in *Savoretti v. Voiler*, 214 F. 2d 425, Footnote 4.

Similarly, when this court, in an exclusion proceeding, was again confronted with the dual concept of "entry," it resolved the question in favor of the alien because:

" . . . We are not disposed to believe that Congress intended so monstrous an application of the statute."

(*Carmichael v. Delaney*, 170 F. 2d 239, 243.)

That a more liberal approach to a law which "bristled with severities"²³ was welcomed by this court is apparent from Judge Healy's observation in the *Delaney* case that:

²²Rather than "reversed on other grounds" as indicated in appellee's brief at page 58.

²³*Harisiades v. Shaughnessy*, 342 U. S. 580; *Sigurdson v. Landon*, 215 F. 2d 791, 798.

“ . . . in *Delgadillo v. Carmichael*, *supra*, the (Supreme) Court brought a needed measure of restraint into the interpretation of the law on the subject.” (P. 242.)²⁴

and from his comments regarding the alternative view, at p. 245:

“Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee’s situation exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo. The sole distinction resides in the mere matter of nomenclature. The distinction, we think, is of no moment insofar as concern the Constitutional guaranty of due process of law.”

Moreover, this same concern for the incongruities of the deportation laws seems to underlie the circuit’s rationale in *Del Guercio v. Gabot*, 161 F. 2d 559, at 561, and in *Mangaoang v. Boyd*, 205 F. 2d 553 (both involving construction of the term “entry”), as it did in the 2nd Circuit opinion in *Di Pasquale v. Karnuth*, 158 F. 2d 878 (also an “entry” case).

But the manifest injustice resulting from accepting appellee’s version of “entry” is primarily in its consequences to appellant. For the Government proposes to punish appellant simply for pursuing his occupation in Alaska, rather than in Oregon or California. This result is outrageous not only because it impugns to Congress a legis-

²⁴In fact, it would appear that this court felt constrained to render the holding it did in the *Delgadillo* case primarily, if not solely, because of precedent Supreme Court rulings.

lative purpose for which there is no evidentiary basis, but because it in fact flaunts an express Congressional definition of "United States" which specifically incorporates Alaska (Sec. 101(a)(38) of the Act)—a definition, by the way, upon which the appellant was entitled to rely in following his vocation to Alaska. (See: *Carmichael v. Delaney*, *supra*; *Savoretti v. Voiler*, *supra*; *Taran v. Brownell*, *supra*.)

Furthermore, "the right to work is the right to eat, to live in freedom, to hold property." (*Barsky v. Board of Regents*, 347 U. S. 442, 472 (dissenting opinion of Justice Douglas).) But, the "right to eat" should not be conditioned upon the nature of one's occupation. Yet, the Government is saying, *post facto*, that appellant is to be forever exiled not for a crime he may have committed (and for which he was already punished); not for taking a lark,²⁵ but for "being hungry."²⁶ Obviously Congress intended no such iniquity, and the courts will not tolerate it. The poignant language of Judge Learned Hand cries out for application here:

" . . . Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free and rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." (*Di Pasquale v. Karnuth*, *supra*, at p. 879.)

²⁵Compare: *Di Pasquale v. Karnuth* (C. C. A. 2), 158 F. 2d 878; *Savoretti v. Voiler*, 214 F. 2d 425.

²⁶Compare: *Kwong Hai Chew v. Colding*, 347 U. S. 590; *Takahashi v. Fish and Game Commission*, 334 U. S. 410; *Truax v. Raich*, 239 U. S. 33.

II.

Appellant Is a Citizen of the United States, or at Least a National Thereof, and Hence May Not Be Excluded or Deported.

Appellee has apparently misconceived the thrust of appellant's opening remarks respecting his status. Appellant is not content to rest his claim upon mere nationality, but contends that he derived United States citizenship from Article XIV, Section 1, of the Constitution which reads, in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

For the purpose of this Constitutional provision, the United States encompasses territory under the American Flag. (*De Lima v. Bidwell*, 182 U. S. 1; *Gonzales v. Williams*, 192 U. S. 1.) At the time of appellant's birth, the Philippines were American territory, and subject to the jurisdiction of the United States. (See: *Cabebe v. Acheson*, 183 F. 2d at 798, for historical references.) Therefore, aside from whatever nationality status Congress may have statutorily (albeit superfluously) conferred upon him, appellant was at all times herein a citizen of the United States, a standing which, it is respectfully submitted, Congress may not Constitutionally molest.²⁷ While the Government has sought to assimilate appellant's status to that of Filipinos in three preceding

²⁷*Terada v. Dulles*, 121 Fed. Supp. 6. This decision was appealed by the Government, but subsequently dropped and dismissed. See also: *Okimura v. Acheson*, 111 Fed. Supp. 303; *Murata v. Acheson*, 111 Fed. Supp. 306. (See Footnote 29, *infra*, for the judicial history of these two cases.)

cases,²⁸ it is significant that none of the appellants therein even *claimed* American citizenship. Thus, this Court did not have before it the question raised by this appellant, that is, whether Congress has the authority to divest appellant, of his United States citizenship without his express consent.

In the three Filipino cases just referred to, this Court held that a loss of *nationality* had taken place. To reach this conclusion, the court relied upon various acts of Congress from which it deduced a Congressional intention to denationalize Filipinos residing in the United States. In *Cabebe v. Acheson*, 183 F. 2d 795, the court found this inference necessary because:

“There is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the islands on the date of their independence.” (P. 801.)

This same rationale was applied to the *Mangaoang v. Boyd*, 205 F. 2d 553, and *Gonzales v. Barber*, 207 F. 2d 398, cases. When, however, the Supreme Court granted certiorari in the *Gonzales* case (346 U. S. 914), it accepted unlimited jurisdiction. Although the Supreme Court found it unnecessary to reach the nationality issue, the importance of the court's readiness to pass upon the question cannot be overlooked. Especially is this true where the relationship involved here suggests an even closer affinity to this country—*i.e.*, citizenship.

What the Supreme Court had in mind when it accepted unlimited jurisdiction in the *Gonzales* case is obviously a

²⁸*Cabebe v. Acheson*, 183 F. 2d 795; *Mangaoang v. Boyd*, 205 F. 2d 553; *Gonzales v. Barber*, 207 F. 2d 398.

subject for only calculated speculation. But there is some authority which may be indicative of its attitude toward this issue.

In a not inapposite case, *Perkins v. Elg*, 307 U. S. 325, the Supreme Court said:

“If the abrogation of the right (to elect nationality) had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity.” (P. 337.)

In *Mandoli v. Acheson*, 344 U. S. 133, at p. 139, the court reiterated its view that:

“the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts *except pursuant to a clear statutory mandate*.”

The Supreme Court’s willingness to review the question may also have been in line with its practice (as well as this court’s) of favoring construction of a statute which avoids forfeiture of residence. (*Fong Hazv Tan v. Phelan*, 333 U. S. 6.) Of course, here, we are dealing not with mere deprivation of home, but of appellant’s birthright—his United States citizenship.

Of utmost concern, however, is the contention of the Government here that it has the authority to divest its citizens and nationals of their heritage. If this is so, then consider the awesome result in light of *Harisiades v. Shaughnessy*, 342 U. S. 580, 587, 598, which acknowledges the power of the Congress to expel aliens for any reason or for none.

But if:

“The power of naturalization vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away,” (*United States v. Wong Kim Ark*, 169 U. S. 649, 703),

then it follows that Congress had “no power whatsoever to interfere with American citizenship by birth.” (*Okimura v. Acheson*, 99 Fed. Supp. 587, 588, 111 Fed. Supp. 303; *Murata v. Acheson*, 99 Fed. Supp. 591, 111 Fed. Supp. 306;²⁹ nor with American nationality either. (Cf. *Perkins v. Elg*, 307 U. S. 325, 337.)

Moreover, a citizen, and presumably a national who also “owes permanent allegiance to the United States,”³⁰ may not conveniently repudiate their obligations of fealty to this country by expatriation. (*Kawakita v. United States*, 343 U. S. 717.) Citizenship is a two way street. (*Ainslee v. Martin*, 9 Mass. 454.) Expatriation requires the consent of both parties. (*Kawakita v. United States*, *supra*; *Dos Reis v. Nicolls*, 161 F. 2d at p. 862.)

²⁹In the *Okimura* and *Murata* cases, Judge McLaughlin of the District Court of Hawaii held subsections (c) and (e) of 8 U. S. C., Section 801, unconstitutional for the reasons aforementioned. Both decisions were appealed directly to the Supreme Court, which remanded them for “specific findings.” (*Acheson v. Okimura*, 342 U. S. 899; *Acheson v. Murata*, 342 U. S. 900.) Upon remand, Judge McLaughlin made the findings directed, but again held the subsections invalid. (111 Fed. Supp. 303 and 306.) Although the Government again appealed, it subsequently dropped and dismissed the appeals, leaving the rationale of Judge McLaughlin’s decisions in force.

³⁰Section 101(a)(22) of the Act.

If, however, this Court finds the instant case indistinguishable from the *Cabebe* line of decisions, then appellant respectfully invites the court's consideration of the piquant language of Mr. Justice Frankfurter³¹ accompanying his revocation of a former view:

"Wisdom too often never comes, and so one ought not to reject it merely because it comes too late."

And the late Mr. Justice Jackson, in receding from a former position, concurred in *McGrath v. Kristensen*, 340 U. S. 162, at 178, with this conclusion:

"If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."

If the resulting deportation of *Gonzales*,³² *Mangaoang*³³ and *Delaney*³⁴ could evoke such concern from this court because of the severity of the penalties thereby inflicted upon them, how much more should this Court be concerned when an implied construction is being used to deprive appellant not only of his residence, but of his heritage.

For these reasons, and in light of the aforementioned developments, it is respectfully urged that the court reconsider its position on this issue.

³¹Dissenting in *Hensell v. United Planters National Bank & Co.*, 335 U. S. 595, at 600.

³²*Gonzales v. Barber*, 207 F. 2d 398.

³³*Mangaoang v. Boyd*, 205 F. 2d 553.

³⁴*Carmichael v. Delaney*, 170 F. 2d 239.

Conclusion.

On the basis of the foregoing, it is respectfully submitted that the judgment of the court below should be reversed. Manifestly, if this court accepts appellant's argument in Part I of this brief, it may direct reversal without the necessity of reaching appellant's second argument, or reconsidering *Cabebe v. Acheson, supra*.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of Section 212(d)(7) of the Immigration and Nationality Act of 1952, and its predecessor, Section 1 of the Immigration Act of 1917, read as follows:

§212(d)(7), *Immigration
Act of 1952*

"The provisions of subsection(a) of this section, . . . shall be applicable to *any* alien who shall *leave* Hawaii, A l a s k a, Guam, Puerto Rico or the Virgin Islands of the United States, and who seeks to *enter* the Continental United States or any other place under the jurisdiction of the United States"

§1, *Immigration Act of
1917*

". . . but if *any* alien shall *leave* the Canal Zone, or any insular possession of the United States, and attempt to *enter* any other place under the jurisdiction of the United States, nothing shall be construed in this Act as permitting him to *enter* under any other conditions than those applicable to *all* aliens."



No. 14523

United States
Court of Appeals
for the Ninth Circuit

TRANS WORLD AIRLINES, INC., a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM McKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,
Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 359 to 724, inclusive)

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

FEB - 1 1955

PAUL P. O'BRIEN,



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(Testimony of Harold Stanley Messersmith.)

Q. Are airlines in competition with TWA paying on the basis of regular rates and charges according to the schedule now in effect?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial; what some other user of the Airport pays can have no bearing on the liability of TWA to the City and County.

The Court: Objection overruled. Proceed.

A. Yes, other scheduled airlines are paying the prevailing and established schedule of rates and charges.

The Court: What are the prevailing rates and charges?

The Witness: For that particular type of aircraft?

The Court: Yes.

The Witness: On the take-off basis it would amount to approximately fifteen to sixteen dollars per take-off, which as I said before, would entitle them to a landing also. I might add that that includes not only the use of the runways, but all of the common use facilities and the public address [137] announcement concerning the arrivals and departures of aircraft as well.

Mr. Thomson: Q. Will you describe in a little further detail what those common use facilities mean?

A. The common use facilities I have reference to include various lights, which include the center lane approach lighting system; the use of the run-

(Testimony of Harold Stanley Messersmith.)

ways; the use of the taxiways; the loading aprons and the course fingers and the public address system.

Q. By common use facilities, as that phrase designates, is meant the common facilities that are available to all airlines?

A. Yes, that is true; they are available to all airlines and to others.

Q. That leads me into a subject concerning aircraft other than those planes which run on scheduled operations. Do you have other types of aircraft coming in and out of the Airport?

A. Yes; we have corporation-owned aircraft, privately-owned aircraft, non-scheduled or irregular air carrier aircraft, and military.

Q. Will you define what you mean by that word "corporation aircraft"?

A. Well, the corporation-owned aircraft is an aircraft that is normally owned by a corporation and operated by them for the various officials of the company in carrying out their business. [138]

Q. Do you find that practice of corporation aircraft operating increasing or decreasing?

A. There has been a considerable increase since World War II in the use of corporation type aircraft.

Q. Are there aircraft other than those you have described? I take it I may be permitted to lead the witness a moment. Are there private flyers coming in and out of the Airport?

A. Yes, there are privately-owned aircraft that

(Testimony of Harold Stanley Messersmith.)

use the Airport and some of their airplanes run into sizes as large as the smaller aircraft operated by the air carriers.

Q. All of these different types of aircraft, including the corporation-owned aircraft and so forth, and the private flyers, amount to what percentage of the activity at the Airport?

Mr. Dyer: Just a moment; I wonder if we could have a foundation laid as to whether you mean volume or frequency of use?

Mr. Thomson: I am going to ask the witness to put it in percentage of movement.

A. In percentage of movement, the private aircraft, corporation and military movements amount to approximately 20 per cent of the total traffic at the San Francisco Airport.

The Court: How much?

The Witness: Twenty per cent.

Mr. Thomson: Q. How are these aircraft that you have just described handled upon the basis of charges? [139]

A. They are required and do pay the same schedule of charges as is applicable to scheduled air carriers in our 1950 schedule of rates and charges. There is no differential between a corporation-type aircraft landing there and a scheduled air carrier; they are on an even basis.

Q. Well, that is likewise true, is it not, of privately-owned aircraft that might be owned by some flying enthusiast rather than a corporation?

(Testimony of Harold Stanley Messersmith.)

A. That is correct; it applies to private aircraft owners and irregular air carriers as well.

Q. Now getting to the subject of the use by the Army during the period of World War II, what did those uses mainly consist of?

A. During the early stages of the war the Army principally had at the San Francisco Airport P-39 aircraft. That is an airplane that I would estimate weighs in the vicinity of twenty to twenty-five thousand pounds. It is a pursuit type of aircraft. In 1943 they introduced a number of P-38 aircraft that were operated at the Airport. They weighed approximately thirty to thirty-two thousand pounds.

Q. Did transport planes come into the Airport with any regularity?

A. Yes, in 1944 or thereabouts United Air Lines and Pan American operated aircraft for the United States Army and the Navy from the San Francisco Airport. Those aircraft were of [140] the DC-4 type and weighed approximately 54,000 pounds.

Q. Did bombers come into the Airport during that period of time, of the United States?

A. There were relatively few bombers operated in and out of the San Francisco Airport during the war.

Q. And how much did those bombers weigh?

A. A few of them may have weighed as high as 65,000 pounds.

Q. A few of them may have weighed as high as 65,000 pounds. Was there any regular scheduling of transport planes or bombers?

(Testimony of Harold Stanley Messersmith.)

A. Both United Air Lines and Pan American operated a limited number of trans-Pacific flights from the San Francisco Airport during the war.

Q. How many on an average per day, bombers or transports, would come into the Airport?

A. Of the heavy type of aircraft, perhaps two or three.

Q. Per day? A. Yes.

Q. Is there any distinction in your mind, Mr. Messersmith, about strain upon airport facilities from intermittent operation or on regular operation or schedules?

A. Yes, there is. Given time, the difference—During war conditions you would anticipate that your airport would be put to maximum utilization, and we actually encouraged the use of the field by the Military then. We made them available to them without charge. However, they did agree to take care [141] of the damage that was sustained because of the use of heavy aircraft that would exceed the capacity of our facilities.

Now, you asked me whether the intermittent or minor use of the field as compared with continuous use would have a different effect. Yes, a repetition of a strain or load or excess loads on a runway or taxi-way would accelerate the deterioration. You may be able to accommodate a few movements in excess of the loading capacity on a given facility, but if you have a repetition of those movements you are going to accelerate the deterioration.

Q. Now, did you observe upon the surface at

(Testimony of Harold Stanley Messersmith.)

the Airport any deterioration that was visible to the eye?

Mr. Dyer: I will object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: If he knows, he may answer. Objection will be overruled.

A. Yes, I definitely did. As a matter of fact——

Mr. Thomson: Q. Before you go further, let me ask you about what date that was when you first observed that condition?

A. 1946 and 1947, about that time.

Q. And what did you see?

A. The loading apron in front of the terminal building, which had been constructed to accommodate aircrafts weighing up to 28,000 pounds, deteriorated and broke up. The pavement became disintegrated to such an extent that we had to purchase [142] on an emergency basis what is called heavy bomber landing mats and cover the entire area so that TWA and other scheduled air carriers, heavy aircraft, could continue to utilize this facility.

Later, extensive reconstruction of the area, or complete reconstruction of the area was necessary in order to have a safe operation in front of the Domestic Terminal Building.

Q. Bearing in mind the—Oh, pardon me, I withdraw that.

In October 1942, what were the lengths of the runways at the Airport?

A. In October 1942 the prevailing wind or prin-

(Testimony of Harold Stanley Messersmith.)

cipal runway at the Airport, which is designated as 10-28, was 6,000 feet in length and was 150 feet wide. The other runway available at the time was the north-south runway, designated as 18-36, was 4,500 feet in length and 150 feet wide.

A third runway that was soon to become deactivated was 5,500 feet in length and 150 feet wide.

The Court: What is the situation at the present time in relation to the runways?

The Witness: At the present time we have four runways. The instrument-landing or prevailing wind runway is 8,870 feet in length, 200 feet in width. The parallel runway to that is 6,500 feet in length, 200 feet wide.

The north-south runways are now designated as 1-19, and they are 7,750 feet in length and 7,000 feet in length, [143] respectively. There are two of them and they are parallel runways.

Mr. Thomson: Q. In addition to the enlargement on the length and width dimensions of the runways, was there anything else done to them since 1940?

A. Well, in addition to lengthening them, the elevation of the entire Airport had to be increased in order to gain sufficient compaction to be able to stand the heavy loads of aircrafts that were introduced into service. That meant that the runways had to be not only lengthened, but strengthened considerably and in accordance with CAA requirements, had to be widened from 150 feet to 200 feet.

That necessitated a complete change in the light-

(Testimony of Harold Stanley Messersmith.)

ing system throughout the Airport in addition to the rest. It entailed a complete construction of a new drainage system to take care of the run-off of water, that is, what rain water that may fall on the runways. It was a very comprehensive business and run into approximately \$18,000,000.

Q. In your opinion, what necessitated these alterations and improvements that you have described?

Mr. Dyer: Just a moment. I object to that upon the ground that it is obviously calling for an opinion and conclusion of the witness.

Mr. Thomson: I think it is a question on which the witness can give his opinion and conclusion. He has been [144] at the Airport for years.

Mr. Dyer: I think that calls for the opinion of an expert engineer, if Your Honor please, one who is professionally qualified.

The Court: Does that not go to the weight of the testimony, if there is any question about it?

Mr. Dyer: I think it not only goes to the weight, Your Honor, but in accordance with our previous objection, it is also not pertinent to the issues here.

In addition, it would seem to me this testimony must necessarily be irrelevant.

The Court: Well, I want to say to you that you would be amazed how little I know about this Airport down here, and I wish to be informed, and on every detail of it, without doing violence to your legal objections. I will allow the testimony. The objection will be overruled.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Q. Have you the question in mind, Mr. Messersmith?

A. No, I would appreciate having the question repeated.

The Court: Pardon me, didn't you say you were 17 years down there?

The Witness: I have been with the Airport since 1927.

The Court: That is how many years?

The Witness: 26. A little in excess of 26 years.

The Court: All right, proceed. [145]

(Thereupon the Reporter read: "Question: In your opinion what necessitated these alterations and improvements that you have described?")

A. Well, in order for the scheduled air carriers who were operating from the airport and who had planned to operate larger aircraft, it was necessary that these—it was necessary to accomplish these improvements if they were to continue their operations at the San Francisco Airport in safety.

Mr. Thomson: Q. Mr. Messersmith, holding in mind the facilities with which you are familiar that were at the Airport in October of 1942, would it in your opinion have been possible for TWA to operate the planes now being operated by them with safety at the present day? A. No.

Mr. Dyer: Your Honor, may it be deemed that I am objecting to all these questions?

The Court: The record so shows. Objection overruled.

A. No, it would not be.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Q. Do you know a gentleman by the name of Mr. Jens?

A. No, I do not personally know Mr. Jens, but I have received various correspondence—or I should say the manager of the Airport department has received various correspondence from Mr. Jens.

I understand he is the secretary for Trans World Airlines, [146] and he has executed some of the agreements, or at least signed some of the agreements between TWA and the City.

Q. When those communications directed to the manager of the Airport came in, would they come to your attention? A. Yes, they did.

Mr. Thomson: I think, gentlemen, you will stipulate that Mr. Jens is what he assumes to be, a secretary of Trans World?

Mr. Thompson: He was. He is not now.

Mr. Thomson: He was in May—May 17th, 1946, secretary?

Mr. Dyer: We will not stipulate he wrote that letter in his capacity as an employee of TWA. To our knowledge he wrote that letter in his capacity as a member of a committee that was formed at the request of the Airport people.

The Court: The letter will have to speak for itself if there is any question about it.

Mr. Thomson: Q. I will show you this letter under date of May 17, 1946, signed by A. N. Jens, Jr., who signed as secretary, and these gentlemen have been good enough to stipulate he was secre-

(Testimony of Harold Stanley Messersmith.)
tary of Trans Continental and Western Air at that time. Do you recall receiving that letter?

A. Yes, I do.

Q. May I have it back, Mr. Messersmith?

A. Surely.

Mr. Thomson: I will offer this letter as our next exhibit [147] in order.

Mr. Dyer: We object to it on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled.

Mr. Dyer: No foundation has been laid.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit E admitted and filed in evidence.

(Thereupon letter identified above was received into evidence and marked Defendants' Exhibit E.)

Mr. Thomson: Q. That letter, in substance, Mr. Messersmith, makes a recommendation—may I see that, Mr. Clerk, and I will give it right back to you?—That letter, Mr. Messersmith, in substance requests that a certain——

The Court: (interposing) It is dated when?

Mr. Thomson: May 17, 1946, Your Honor. Slightly less than four years after the execution of the lease.

Mr. Thomson: Q. This letter in substance makes recommendation of a certain space between runways of 1500 feet from center line to center line. What was done, if anything, with respect to the request contained in this letter?

(Testimony of Harold Stanley Messersmith.)

A. A conference——

Mr. Dyer: Just a moment. Mr. Thomson, I wonder if we could go into that a moment? I don't recall at this point whether any request was made in the letter. [148]

Mr. Thomson: You will find it there in so many words, Mr. Dyer.

Mr. Dyer: Perhaps I will. I would like to see it.

Mr. Thomson: It is about the middle of the letter.

The Court: We will take a recess and you will have an opportunity to examine it if you wish.

(Short recess.)

Mr. Thomson: Is there a pending question, Mr. Reporter? I rather think there is.

The Reporter: The document was offered in evidence.

Mr. Thomson: Was that received in evidence? Yes, thank you.

Mr. Thomson: Q. What was done, if anything, in response to the request contained in this letter about the distance between those runways?

A. A conference was held between TWA representatives and representatives of the Airport in the manager's office so that the recommendations of TWA could be fully discussed and a decision reached. The manager of the Airport Department, Mr. Doolin, advised TWA that we could not afford to build runways with a 1500-foot separation between the center line, that the cost would be pro-

(Testimony of Harold Stanley Messersmith.)

hibitive. That was the general outcome of the conference.

Mr. Thomson: You may take the witness. Oh, pardon me, there is one thing more I overlooked.

Mr. Thomson: Q. In testifying as to the imposition of costs and charges pursuant to the schedule to make it safe for this type of aircraft, were there any types of aircraft that were exempt from payment of the rates and charges?

A. Yes, military aircraft.

Q. You made no charge for military aircraft?

A. That is correct. There was no charge for military aircraft.

The Court: Is that true now?

The Witness: Yes, that is correct, at the present time.

Mr. Thomson: Q. With the exception of military aircraft, I understand you too have testified that all the other types of aircraft which you have mentioned, the private flyers, the corporation type of plane, and those others you have mentioned, they are all charged at the regular rates?

A. They are all paying the same rate for the same weight of aircraft.

Mr. Thomson: You may take the witness.

Mr. Dyer: Is Your Honor disposed to hear motions to strike in reference to the testimony of this witness at this time or at the conclusion of the case?

The Court: At the conclusion of the case.

Mr. Dyer: Thank you, sir. And I take it we are

(Testimony of Harold Stanley Messersmith.)

cross examining Mr. Messersmith, of course, without prejudice to any subsequent motion to strike?

The Court: That is right. [150]

Cross Examination

Mr. Dyer: Q. Mr. Messersmith, as I listened to your recitation of your duties at the Airport I understood that you are the business administrator of the Airport, is that correct?

A. I act as principal assistant to the manager of the Airport Department in the business administration of the Airport.

Q. And you have to do with the collection of funds from various businesses at the Airport, do you not?

A. Yes, that is one of my functions.

Q. And that includes collection of funds not only from airlines but other businesses that utilize space and facilities at the Airport, is that not so?

A. Yes, that activity is under my jurisdiction, if I do not perform it personally.

Q. During the course of the improvement at the airport, from time to time have you planned the development of the Airport?

A. I have collaborated with Mr. Turner, the Manager of Utilities, and the Manager of the Airport and others in the Utilities Engineering Bureau in preparation of preliminary plans for the development of the Airport.

Q. You have been cognizant of the plans made and have taken some part therein, is that so, sir?

(Testimony of Harold Stanley Messersmith.)

A. Yes.

Q. During the course of your tenure at the San Francisco [151] Airport have you had an opportunity to receive any professional training in cost engineering?

A. No, I have no professional training in cost engineering. That training that I have is based on practical experience.

Q. You are not a registered, professional engineer, is that so, sir? A. I am not.

Q. And you are not a certified public accountant? A. I am not.

Q. The Airport, of course, is operated by the Public Utilities Commission, is it not?

A. Yes, it is.

Q. And the Airport is a rather large business, isn't that so, sir?

A. The Airport is a large business.

Q. In addition to those airlines, the airline business that is conducted there, there are many other businesses, is that not so, sir?

A. Yes, there are many other businesses.

Q. How many airlines are presently operating at the Airport? We received information from various other witnesses that you are at the spot, Mr. Messersmith, at the Airport at the present time, and I would like to have that information.

A. There are 12 scheduled air carriers regularly operating from the San Francisco Airport at the present time. [152]

Q. Would you be good enough to give us your

(Testimony of Harold Stanley Messersmith.)
information concerning the number of passengers that utilized the Airport last year, passed through—approximately?

A. Approximately two million five hundred thousand.

Q. And is it a fact that about every passenger that comes to the Airport brings with him about one or more other persons?

A. That figure you just quoted is the national standard. However, when we submitted data to the CAA on that—that is where you acquired your figure, I believe—we found the number of visitors at our Airport were far lower than that number.

Q. Well, what were the total number of people, according to your knowledge, that used the Airport last year—passengers and non-passengers?

A. Are you asking me to guess a number?

Q. I want your best knowledge. I don't want an exact figure. I want an approximate figure.

A. Well, excluding the employees that come to the Airport, which consists of between eight and nine thousand people, there were probably close to three and one-quarter million people visited the Airport, including passengers coming in and out of the Airport and sightseers.

Q. And they were all members of the public that patronized the various businesses there, were they not?

A. Yes, they were members of the public that patronized businesses there, but they didn't neces-

(Testimony of Harold Stanley Messersmith.)

sarily all use the [153] common use facilities of the Airport for which we effect charges.

Q. But they were all members of the public that used the roads in front of the air terminal and space available to the general public, is that not so?

A. Yes, on the same basis of charges that apply to the airline patrons. That is, if they used the parking lot they paid the same fee for parking privileges as an airline customer. Yes, that is correct.

Q. Now, does the airline have any definite service area subject to the Public Utilities—I beg your pardon.

Does the Airport have any definite service area subject to the Public Utilities? Do you understand what I mean by that, sir?

A. I would prefer that you elaborate on it.

Q. You understand that recognized utilities, old line utilities such as the telephone company and gas company, have a certain area in which they alone have the exclusive right to serve? You understand that, do you not, sir?

A. Do you mean within the property that they own? You referred to the telephone company. You mean they have exclusive rights within that building?

Q. They have exclusive rights within the general area to serve the public within that area, isn't that so?

The Court: Are we going outside the Airport itself?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Yes, sir. [154]

Mr. Dyer: Q. What I am trying to get at is this: Whether or not the Airport has no definite service area within which it alone is entitled to serve. Isn't it a fact that any other community having the permission of San Mateo County could locate an airport in San Mateo County?

A. Yes, I presume that they could.

Q. Yes. Now, in studying the charges which you thought should be included in the schedule of rates and charges, did you ever determine how the schedule—how charges were allocated or embodied in—imposed at the Lockheed Airport in Los Angeles?

A. Yes.

Q. That is a private airport, is it not?

A. Yes.

Q. That is not a public utility, is it, sir?

Mr. Thomson: Well, that would be calling for a conclusion of the witness, Your Honor.

The Court: If he knows I will allow it. It goes to the weight of the testimony. If he knows.

A. I do not know.

The Court: All right.

Mr. Dyer: Q. It isn't a municipal airport, is it, sir? A. It is not a municipal airport.

Q. Have you any knowledge of under what agreements with airlines or other arrangements charges are made to airlines [155] at that airport?

Mr. Thomson: Mr. Dyer, what airport are you talking about?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: I am referring to Lockheed at Los Angeles.

Mr. Thomson: Lockheed at Los Angeles? Thank you.

The Court: How many airports do they have down there?

Mr. Dyer: Two. Lockheed and International.

The Court: Both of them are private?

Mr. Dyer: Lockheed is.

The Court: What about the other?

Mr. Dyer: The other, I understand, is under the jurisdiction of the City of Los Angeles.

The Court: All right, proceed.

Mr. Dyer: May I have the question pending, sir?

(Question read by the Reporter.)

A. Well, I am somewhat familiar with the situation down there. I have talked with Mr. Wulfeheuhler and Mr. Katzenhauser, who are the manager and the assistant manager, respectively, of the Lockheed Air Terminal.

They have told me that the Airport was developed by the Lockheed Aircraft Corporation to a great extent——

Mr. Dyer: Q. Mr. Messersmith, just a minute. What I want to know is, under what arrangements charges are made.

A. I am explaining that. —was developed by the Government through certain connections with the Lockheed Air Terminal [156] during the war time when it was necessary for the production of Lockheed Constellations Aircraft to have a place to take

(Testimony of Harold Stanley Messersmith.)
and test and prove these aircraft. Consequently, they are not confronted with the same problems that we are.

Mr. Dyer: Q. Just a moment.

Mr. Thomson: Just a moment. Let him finish.

Mr. Dyer: If it please the Court, I move to strike all this answer thus far on the ground it isn't responsive. All I want to know is, under what arrangements with airlines are charges made to airlines for use of space and facilities at that airport, if he can.

The Court: I take it he is coming to that.

A. You have to have some historical background to be able to determine these facts.

Mr. Dyer: Your Honor, I submit this question asked for an answer of ultimate fact and not for a great deal of explanation and peroration.

The Court: Do you know the fact?

The Witness: The charges are competitive because the airport a few years ago moved from Burbank to the Los Angeles International Airport, and those people I mentioned before, Mr. Katzenhauser stated that in order to attract the airline business back they offered inducement charges to the air carriers. It was an inducement proposition, so that they were not confronted with the problem of maintaining the landing [157] field facilities; that under their arrangement the costs were assumed to a great extent by the Lockheed Aircraft Corporation.

Mr. Dyer: I move to strike all that answer as

(Testimony of Harold Stanley Messersmith.)

not responsive. I simply want to know whether the charges are made under contract or lease or under some other arrangement.

The Court: I will allow the record to stand. Proceed.

Mr. Dyer: Q. Now, will you tell me, at that airport under what type of agreement are charges made to airlines, under contract, lease, or some other type of arrangement?

A. I do not know that.

Q. You never discussed that matter with these people?

A. As I mentioned before, they were inducement rates in order to acquire service at that airport after the airline had moved to the Los Angeles International Airport.

Q. In the course of these rather lengthy discussions with these people you have mentioned at Lockheed you never touched upon the type of arrangement that is used with the airlines, is that what you testify?

Mr. Thomson: He didn't say they were lengthy discussions.

Mr. Dyer: Q. All right, in the course of these discussions?

A. I do not recall that. I may have, but I do not recall.

Q. Now, isn't it a fact that at the Los Angeles International Airport, which is a municipal operation, charges are made to airlines for the use of space and facilities under contract [158] or a lease?

(Testimony of Harold Stanley Messersmith.)

A. Not with their scheduled air carriers. Some of the preferred air companies are on it because they have preferential charges, lease agreements, and others have not.

Q. It is a fact that some of the operating companies at Los Angeles International Airport at the present time do have these lease agreements, is that so, sir?

A. I don't know it to be a fact. I have not reviewed their records.

Q. You referred to various leases at the San Francisco Airport. You also testified, if I am correct, sir, that TWA pays—that no other airline pays under a lease.

Isn't it a fact that United Air Lines pays for the use of space and facilities at the present time under lease with the Public Utilities Commission?

A. I did not testify to the statement you just made, that no other airline operated under a lease. I stated that no other air carrier pays the schedule of rates and charges that is now in existence at the San Francisco Airport.

Q. Does United?

A. United does not, but they pay a higher rate——

Q. Just a moment.

A. ——than does TWA.

Q. Your testimony then, that no other airline—that all other airlines pay under a schedule of rates and charges is [159] not completely correct, is that true?

(Testimony of Harold Stanley Messersmith.)

A. I did not testify——

Mr. Thomson: I object to that. Just a moment, Mr. Messersmith. I object to that as an improper repetition of the evidence. He did not testify there were no other leases at the Airport. He testified various other airlines paid the regular rate according to the schedule of rates and charges.

Mr. Dyer: All right, I will put this question again:

Q. Is United among your designation of all other airlines who were paying under the schedule of rates and charges?

A. I did not—You are telling me that I said all other airlines. I said other air carriers——

Q. (interposing) Some other air carriers?

A. ——pay under the basis of the present schedule of rates and charges. United Air Lines has a lease agreement with the City and they do not pay on the basis of the existing schedule of rates and charges.

Q. They pay under a lease agreement with the City, do they not, sir?

A. They are paying under a lease agreement with the City.

Q. Isn't it a fact that they are the largest operator at the San Francisco Airport of all your scheduled airlines?

A. Yes, it is a fact.

Q. And they have more planes taking off and landing than any other airline at that Airport?

A. Yes. [160]

(Testimony of Harold Stanley Messersmith.)

Q. What is the term of that lease?

A. The term of the lease? Forty years.

Q. You also have a lease agreement with Pan American for the utilization of the space, do you not, sir?

A. Yes.

Q. And that is the second largest operator of the San Francisco Airport, is it not?

A. By second largest operator, in what classification do you mean?

Q. Well, how about volume of traffic?

A. No, they are not.

Q. Are they third?

A. I would have to refer to my figures to tell you just where they are in volume of traffic, but they are one of the major air carriers at the San Francisco International Airport.

Q. Are they presently operating under the terms of that lease?

A. Yes, they are; but they are paying the prevailing rate in the charge schedule for all activities insofar as common use facilities are concerned.

Q. What is the term of that lease, sir?

A. It is for a period of 20 years.

Q. Isn't it a fact that leases were made to the airline for the use of landing facilities before the TWA lease was executed in 1942 at the San Francisco Airport?

A. If my memory serves me correctly, there was one prior [161] lease with a scheduled air carrier.

Q. Isn't it a fact leases were made with sched-

(Testimony of Harold Stanley Messersmith.)

uled air carriers after the lease with TWA was executed in 1942?

A. There was one lease made subsequent to the TWA lease in 1942.

Q. Isn't it a fact that at the present time you are negotiating with airlines for the leasing of space at the San Francisco Airport?

A. That is true. We are conducting preliminary negotiations.

Q. And do those negotiations contemplate the establishment of airline maintenance bases at the San Francisco Airport?

A. Well, I would say they contemplate either operational or maintenance bases at the San Francisco Airport.

Q. And those bases, I take it, would have facilities for maintenance and repair of airlines, would they not?

A. Yes, they would.

Q. And it is contemplated that those airlines will hold that space and operate those facilities under lease with the City, isn't that so, sir?

A. Yes, that is correct. However, they are not incorporated—they will not have incorporated therein any provisions that will freeze the charges for common use facilities.

Q. Yes. Now, Mr. Messersmith, does the Railway Express Agency operate in their express operation at the Airport?

A. Yes, they do. [162]

Q. And that is a carrier such as the airlines,

(Testimony of Harold Stanley Messersmith.)

isn't it? It is a carrier of express instead of passengers, isn't that so?

A. That is correct.

Q. And they serve the general public just as the airlines do, isn't that right, sir?

A. Yes. However, they do not use the common facilities of the airport.

Q. We will get to that. Do they use space at the San Francisco Airport?

A. Yes, they use space that is rented from the City on a space rental permit and they are the tenants of the particular air line.

Q. So they utilize space, this carrier, at the San Francisco Airport under a rental basis at the present time, is that correct?

A. Space that is for their exclusive use, yes.

Q. And I take it they also utilize facilities necessary for the handling of their express, isn't that so?

A. What kind of space do you refer to?

Q. Well, just general space for use of express, and in addition to that utilize handling equipment, and so forth, in handling their express, do they not?

A. On the rented areas, yes.

Q. And the schedule of rates and charges doesn't even purport [163] to apply to that operation, does it, sir?

A. Yes, it does. [163-A]

Mr. Dyer: Q. Can you point to any place in the rates and charges which applies to the utilization of facilities for the handling of express by the Express Company?

A. Yes, the rental of buildings or structures, I

(Testimony of Harold Stanley Messersmith.)

can't recall the part number but it is in our rate and charge schedule.

Q. At the present time it doesn't apply to that, does it? Aren't they renting under a renting agreement that you have described to us?

A. It applies because they are renting space under a rental permit that in this instance has been granted to United Airlines and allows United to act as custodian of a particular building, paved area and unpaved area, and further stipulates that they may sublet that space to other air carriers and to the air express and air mail—that is the Air Express Company and the U. S. Post Office for air mail purposes. All of the various carriers and the Post Office Department and the Air Express Company conduct certain operations in this area that is for their exclusive use; that is, the exclusive use of the custodian and those that he authorizes to use such space.

Q. That is on a lease rental basis?

A. That is on a space rental basis, what may be termed a 30 day revocable permit.

Q. Now, Mr. Messersmith, do Airport limousine companies utilize the common roadways and sidewalk ways at the Airport?

A. Yes, they use the private roadways at the Airport. [164]

Q. That is Airport property, is it not?

A. That is correct.

Q. Just as the ramps and runways are?

A. Yes.

(Testimony of Harold Stanley Messersmith.)

Q. Are there any charges made to the limousine companies for the use of those facilities?

A. Yes; a very appreciable amount of the Airport's revenue is derived from the operations of Airport limousines or bus service to and from the Airport.

Q. Do you have a contract with the limousine companies?

A. We do have a contract with a specific limousine company.

Q. What is the term of that contract?

Mr. Thomson: Well, Mr. Dyer, I will show that contract to you rather than asking for the recollection of this witness as to the term.

Mr. Dyer: I am willing to accept the recollection of this witness subject to any confirmation you may wish to make.

Mr. Thomson: The question is objectionable. I thought I might cooperate if you are interested in this question. Wouldn't you be satisfied with the document?

Mr. Dyer: Your Honor, I think we are going to save time if I simply elicit from this witness the approximate length of the term. That is what I am trying to do.

The Court: What is the length of the term, if you know?

A. The original period was I believe for two years. [165]

Mr. Dyer: Q. Are there also U-Drive Compa-

(Testimony of Harold Stanley Messersmith.)

nies that operate at the San Francisco Airport and utilize the common roadways?

A. There are two U-Drive Companies that have agreements with the Airport, and they pay a stipulated amount per year, or a percentage of their gross profits, whichever amounts to the greater, for the privilege of conducting business at the San Francisco Airport.

Q. Is that privilege obtained from the Airport authority by way of contract?

A. It is obtained from the Public Utilities Commission.

Q. By way of contract?

A. By way of contract.

Q. And what is the term of that contract, to the best of your recollection?

A. Three years.

Q. And you also lease facilities or make facilities available to the Telegraph Company at the Airport, do you not, sir?

A. Yes, we do.

Q. And are those facilities made available under agreement or contract?

A. The agreement provides that they pay us 40 per cent of the gross receipts that we collect; that is, our employees. We actually operate the agency for the Western Union Telegraph Company. [166]

I may say that all of these various activities that you are mentioning go toward making it possible for us to lower the cost of operating the Airport for the taxpayer, however not sufficiently to offset the deficit.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: If the Court please, I will move to strike that volunteered statement as not responsive.

The Court: It may go out.

Mr. Dyer: Q. Has the Telephone Company also utilized a certain small amount of space for the use of its telephone pay stations?

A. Yes, for the exclusive use of their patrons.

Q. Their patrons are any members of the public that come into the Airport, isn't that so?

A. That is correct; they pay us——

Q. Pardon me; had you finished?

A. They pay us 15 per cent of the gross receipts from all amounts taken in.

Q. Those public pay stations are public space and common facilities available to any member of the public that wishes to use them; isn't that correct?

A. For the exclusive use of their patrons.

Q. How is that space made available to the Telephone Company; on a contract or lease?

A. I do not have a copy of the document. I do not think there is one in possession of the Airport Department. As I [167] understand that, it is a comprehensive agreement that covers all city owned buildings. It is credited to the Airport revenue.

Q. To the best of your knowledge it is an agreement that makes available to the Telephone Company these facilities and this space which is available to the members of the Public, is that correct?

A. To the best of my knowledge, yes.

Q. You mentioned a parking lot. That parking

(Testimony of Harold Stanley Messersmith.)

lot obviously is for the storage of any car that comes there, isn't that so?

A. That's right; it is for the exclusive use of the parking lot concessionaire, and he is given the authority to park cars at a stipulated rate there. He pays the City, first of all, an amount for the use of the property involved; and, secondly, it was on a competitive bid basis, and he bid 67½ per cent of his gross receipts, and he pays for all electric energy consumed on the premises.

Q. That space for the storage of cars, of public cars for any member of the public, is made available to the operator by way of contract or agreement or lease, isn't that so?

A. Yes, he has the exclusive use of the property and it is an exclusive agreement.

Q. How many businesses in all operate at the Airport, Mr. Messersmith, approximately?

A. There are several more; I don't know the number exactly; [168] I would merely be guessing. I would like to examine our accounts receivable and other records before I would say how many.

Q. Can you give us your best estimate?

The Court: Approximately.

A. Approximately 12.

Mr. Dyer: Q. They all serve the general public, do they not?

A. Yes, they are all—in all instances provide space for the concessionaire or lessee, who in turn serves the public.

Q. And they are able to serve that public under

(Testimony of Harold Stanley Messersmith.)

agreements of contract or lease with the City, isn't that so?

A. Under contract, not necessarily under lease.

Q. Under agreement of one type or another.

Now, Mr. Messersmith, I notice that you testified that military planes pay no fee for landing and taking off at the Airport; is that correct?

A. That is correct.

Q. And do planes operated by the City in its business capacity pay any fee?

A. We haven't had any operated by the City, so that has not occurred. However, I believe there is an exemption.

Q. There is an exemption for City planes?

A. City owned, if they are operated by the Public Utilities Commission. [169]

Q. How about planes operated by the C.A.A.?

A. I believe the C.A.A. is excluded from charges.

Q. Your schedule of rates and charges has a provision for the use of an entire building, does it not?

A. That is correct.

Q. And that rate schedule right in the rate schedule speaks of a lease, does it not?

A. I would have to refer to the rate schedule to see what the exact wording is. I don't recollect that.

Mr. Thomson: Mr. Dyer, it might be helpful if I gave you this announcement: That my contentions in this case are confined to the common use facilities.

Mr. Dyer: Your Honor, of course that isn't the

(Testimony of Harold Stanley Messersmith.)

issue raised by the pleadings. They question all the charges applicable to TWA under the lease; and in addition, of course, it is our contention that in the very schedule or rates and charges they purport to impose rates and charges for the use of obvious rental space, such as the use of an entire building under agreement.

Mr. Dyer: Q. Mr. Messersmith, I show you Part 4 of the 1951 schedule of rates and charges.

The Court: Page?

Mr. Dyer: Page 4. That is entitled "Rental of An Entire Building or Structure," is it not?

A. That is correct. [170]

The Court: Pardon me; I'm trying to follow you.

The Witness: Part 4.

Mr. Dyer: Part 4, page 4, Your Honor.

Mr. Dyer: Q. That is entitled "Rental of an Entire Building," is it not, Mr. Messersmith?

A. Yes, it is.

Q. And there is a provision in Section 1 for sub-letting, is there not?

A. That is right, providing any arrangement for sub-letting have the prior approval of the Commission.

Q. Do you consider the rental of an entire building and a provision for sub-letting thereof a Public Utility rate—the proper subject for a Public Utility rate?

Mr. Thomson: I object to that upon the ground that it calls for the conclusion and opinion of the witness on a matter of law, Your Honor.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Your Honor, the claim in this case is that all these matters in the schedule of rates and charges are Public Utility rates. This man is the man who has worked on the schedule of rates and charges for the City. Now we would like to inquire as to the factors which motivated him or the City to determine that all of these various things in the schedule of rates and charges are Public Utility rates.

The Court: If he knows, he may answer.

The Witness: I do not know. [171]

Mr. Dyer: Q. You worked on the schedule of rates and charges, didn't you, Mr. Messersmith?

A. The schedule or rates and charges was predicated on cost factors. The legality, as to whether or not they are a Public Utility rate, was not for me to determine.

Q. Were you advised by any representative of the City when you worked on this schedule of the rental of an entire building and a provision for subletting that it was a proper subject to be included in a rate schedule?

A. I prepared the preliminary drafts of the particular schedule of rates that you are referring to.

Q. I do not believe that answer is responsive. Did you receive the advice I have adverted to from any member of the City, any representative of the City?

A. Yes, I was advised by the manager of Utilities to work on the preparation of a rate and charge

(Testimony of Harold Stanley Messersmith.)

schedule applicable to all of the facilities at the San Francisco International Airport.

Q. I notice that his part of the rate schedule applies to the rental of an entire building or structure or rental of a partial building or structure. Are there any other buildings on the Airport which are made available to business operators at the Airport on a lease basis and not under the schedule of rates and charges?

A. There are, yes, to United Airlines and Pan American. [172]

Q. What is the factor that determines that in one instance rental of an entire building should be under a rate schedule and in another instance it should not? What is the distinguishing factor?

A. In recent years, or since the adoption of the 1946 and 1950 schedules of rates and charges, there has been no distinction.

Q. The United lease was entered into after the adoption of the 1946 schedule, was it not, Mr. Messersmith?

A. Yes, in 1947. However, there were no buildings that the City had constructed entirely with their own funds involved in that lease.

Q. But that lease not under the schedule of rates and charges was entered into with United after a schedule of rates and charges was in existence, is that not so?

A. That is correct; and at that time the basic lease was changed to increase the acreage charge

(Testimony of Harold Stanley Messersmith.)
that United paid so that it would be consistent with the schedule or rates and charges.

Q. But that lease was for a definite term, was it not? A. Yes, it was.

Q. For a term of years? A. Yes, it was.

Q. How many years? A. 40 years.

Q. I show you Part 4 of the schedule or rates and charges, [173] page 6, Section 3. Will you read that Section please?

A. (Reading) "Rental as defined shall mean general acreage acquired under agreement with the Public Utilities Commission."

That refers to rental of Airport property unimproved.

Q. Well, now, properly, Mr. Messersmith, is that rental of property or is that a provision for the rental of property under agreement or lease, or is it the provision of a Public Utility service subject to a rate?

Mr. Thomson: If Your Honor please, I think that is purely a legal question that this witness should not be called upon to answer.

Mr. Dyer: This man is the chief man who worked on the schedule of rates and charges. I thank I am entitled to inquire into the extent of his knowledge.

The Court: Read the question, Mr. Reporter.

(The reporter read the question.)

The Court: You may answer, if you know.

A. I do not know.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. Did you write this Part 6 of the schedule of rates and charges? A. Yes, I wrote it.

Q. And did you make any determination or give any thought to the question at the time of whether or not rental under agreement for a definite term was a Public Utility service? [174]

Mr. Thomson: If your Honor please, that is a repetition of the same objectionable question. It calls for a legal opinion of this witness.

Mr. Dyer: He said he didn't know to the last question. I am asking him now if he gave any consideration to it.

Mr. Thomson: Well he says he doesn't know.

The Court: Can you answer the question?

The Witness: Would you repeat the question, please?

Mr. Dyer: May we have it read, please?

(The reporter read the question.)

A. No.

Mr. Dyer: Q. Now will you look at Part 7, page 7 of the 1951 schedule, Mr. Messersmith. What does that refer to?

A. Rental of Airport property, paved areas.

Q. Isn't it a fact that those paved areas are made available to airlines under agreement?

A. This and the other two parts that I have just referred to is property that is not considered common use property at the Airport but that which could be made available for the exclusive use of a tenant. Would you repeat your question if I didn't answer it? [175]

(Testimony of Harold Stanley Messersmith.)

Q. Paved areas are made available under agreement, are they not, in accordance with the schedule of rates and charges?

A. Yes, they are.

Q. For a definite——

A. However, not for a definite period of time. It is merely on an operator's rental permit that is subject to cancellation by the Public Utilities Commission.

Q. Will you, then, read the first sentence of Section 2?

A. (Reading): "Rental rate for general acreage shall be \$600 per year for the following: First, for the ground——"

Q. Yes. If you wanted to rent——

The Court: Let him read it all.

A. (Reading): "Certain \$600 a year minimum charge and/or an acreage charge shall be applicable on a consolidation basis to all charges set forth in Part 6 and Part 7."

Mr. Dyer: Q. That refers to a unit charge of \$600 a year, does it not, sir?

A. Yes. A minimum unit charge.

Q. But it is for the year. A. Yes.

Q. I notice that Section 3 of this Part 7 reads: "Rental so defined shall mean general acreage acquired under agreement with the Public Utilities [176] Commission". By "agreement" do you mean leasing there, sir?

A. Not necessarily. It can mean a space rental permit or a lease that has been granted as a result

(Testimony of Harold Stanley Messersmith.)
of competitive bidding as required by the City Charter.

Q. Now, I notice that Part 9, page 9, of the schedule of rates and charges, refers to rental rates for domestic and international passenger air terminal office building space, does it not?

A. Yes, it does.

Q. Now, that schedule, then, refers to the leasing of office space, isn't that so?

A. That is correct.

Q. Is office space made available to various non-aviation business operators at the Airport?

A. Yes. The Telephone Company is one. TWA, also, in the International Terminal Building occupies space under those provisions.

Q. I notice that Section 2 provides that the tenants—that word is used—must maintain the physical improvements in good condition.

Mr. Messersmith, isn't it a fact that Public Utilities in providing service have an obligation to maintain total facilities, to provide the maintenance?

Mr. Thomson: If your Honor please, I object to that as [177] calling for a conclusion of law upon the part of the witness.

Mr. Dyer: Again, this witness is——

Mr. Thomson: Ostensibly a bare question of law, nothing else.

Mr. Dyer: I am asking if this man knows.

The Court: If you know.

A. They are required to maintain the premises to varying degrees. There is a differential in the

(Testimony of Harold Stanley Messersmith.)

rates whether you occupy an entire or a partial structure, and there the responsibilities of the tenant varies. He has a lower rate where the responsibilities are lower.

Q. Now, Mr. Messersmith, I am not sure that that is responsive. Do you know whether or not recognized utilities such as the Telephone Company provide all maintenance in the provisions of their service as an obligation of the company?

A. Not in dealing with the City and County of San Francisco. The Western Union and the Telephone Company require us to do certain maintenance of their facilities for which we are paid a percentage of gross receipts, along with the payment for the privilege of conducting business there.

Q. I take it that that answer is not predicated upon an examination of the files of public tariffs of the Telephone Company, is it?

A. It is taken upon the contract that we have with Western Union. [178]

Q. With Western Union?

A. Which is a Public Utility.

Q. Part 9, I notice, has a heading, "Delivery of Aviation Fuels". Isn't it a fact that in certain instances the Airport sets itself up as a dealer of aviation fuels?

A. Yes, that is correct.

Q. And that dealership is referred to in the schedule of rates and charges, is it not?

A. Yes, it is.

Q. Doesn't the Airport also make space and fa-

(Testimony of Harold Stanley Messersmith.)

cilities available to petroleum companies for the provision of fuel to automobile owners?

A. For the provision of fuel to automobile owners?

Q. Yes.

Mr. Thomson: Automobile owners?

Mr. Dyer: Yes.

A. No, it hasn't to date.

Mr. Dyer: Q. It contemplates it will, does it not?

A. Oh, yes, we have—we are now negotiating or anticipating the consummation of an agreement for the operation of a service station on Airport property.

Q. And that charge to the member of the public who owns an automobile and comes into the Airport to obtain fuel will not be based on the schedule of rates and charges, will it, sir?

A. The basic charge is on a competitive bid basis. The [179] various petroleum companies were invited to bid for it, and the high bid happened to be—the highest bidder is being awarded. I understand, the contract for the installation at a cost of \$50,000 or more of a service station at the Airport.

Q. With reference to that, isn't it a fact that the TWA lease was entered into after bids were received? A. Yes.

Q. To get back to my question, isn't it a fact that the charge for gasoline to the automobile users at the Airport who come in, public automobile users, is not based on a schedule of rates and charges?

A. It is an amount in excess of the schedule of

(Testimony of Harold Stanley Messersmith.)

rates and charges. The first consideration of the minimum amount would be predicated on the schedule of rates and charges.

Q. I don't think you get what I mean, Mr. Messersmith. I am referring to the charge to the individual automobile owner. Suppose I came into the Airport and asked for a certain number of gallons of gasoline, the charge charged me wouldn't be based on the schedule of rates and charges, would it?

A. No, it would not. However, in the case of parking your automobile it would be.

Q. Yes.

A. There are various agreements down there at the Airport.

Q. Now, Mr. Messersmith, I notice that throughout this schedule of rates and charges you have references to agreements, [180] to subleases, and so forth. Isn't it true that if these matters were involved the provisions of a projected service, that no lease or agreement would be necessary? Isn't a consumer of a utility entitled to service as a matter of right?

Mr. Thomson: If your Honor please, I object to that again as a question of law.

The Court: Objection will be sustained.

Mr. Dyer: Q. Now, Mr. Messersmith, in planning the expansion of the Airport, isn't rather long-range planning necessary?

A. Yes, it is.

Q. And doesn't that long-range planning involve

(Testimony of Harold Stanley Messersmith.)

a forecast of numbers and the types and weights of planes that will use a field in the future?

A. Yes, it does. And it requires the cooperation of the air carriers concerned. Now, we endeavored to recently acquire data upon which to forecast a prospectus of traffic. We asked for it by individual air carrier and as to the type of aircraft that they contemplate, and the volume of movements.

They sent us back a semi-logarithmic chart which said that you can anticipate the same amount of increase in traffic at the San Francisco Airport as the C.A.A. had projected three or four years back for the United States.

We find it very unsatisfactory, and not in accord with giving us the information necessary to make total planning. [181] Consequently, we have to analyze the subject using our own conception as to what the requirements will be.

Q. Well, you seek to obtain your information from the sources that may be of help, do you not?

A. That is true, certainly.

Q. Now, what forecasts were made by the City in 1942 and prior thereto concerning the weight of planes that would come into commercial use at the San Francisco Airport?

A. Well, it is rather difficult to pin it down to any exact period of time because, as you know, an airport is continually undergoing expansion. We have had four or five complete airport developments down there to take care of the changing type of aircraft that was placed into service.

(Testimony of Harold Stanley Messersmith.)

In 1941 or 1942—that was just after Pearl Harbor—we had a tremendous acceleration in the growth of air transportation brought about by the war. We then had ultimate plans in 1942 for that 4,500 foot North-South runway and for the 6,000 foot East-West. However, there was a considerable change right at that particular time, in 1942 and 1943, in our thinking, and we were then able to realize that larger aircraft were going to be operated from the Airport and we laid our plans accordingly.

Q. I wish to get this clear: In 1942 you did have a contemplation of larger planes coming into use, and accordingly the 6,000 foot runway was planned, is that so? [182]

A. The 6,000 foot runway, I testified earlier, was in service. However, it wasn't capable of sustaining the heavy loads of aircraft that later were developed.

Q. Isn't it a fact that an 8,000 foot runway was also contemplated or planned or discussed about that time?

A. It is possible that we did discuss it. We didn't know whether it would ever be realized, but it may have been discussed or considered.

Q. When was the 8,000 foot runway started? When was it constructed or planned? When was the construction or plans for it definitely started?

Mr. Thomson: Did you say construction or plan?

Mr. Dyer: Either one or both.

Mr. Thomson: I object to that upon the ground the question is complex.

(Testimony of Harold Stanley Messersmith.)

The Court: Change the form of the question.

Mr. Dyer: I will simplify it.

Mr. Dyer: Q. When was the 8,000 foot runway definitely planned?

A. Well, prior to 1945 when the electorate passed the general operation bond in the amount of \$20,000,000.

Q. How long before 1945?

A. Possibly two or three years.

Q. Possibly two or three years? So on the basis of that, that 8,000 foot runway would have been planned in 1943 or 1942? [183]

A. That is just what I indicated. There was a tremendous growth in aviation right at that time. The growth was so great that we have accomplished in 10 years what may normally have been anticipated over 20 years or more.

Q. Yes. Now, Mr. Messersmith, I am going to refer you to the allegations contained in the City's answer and cross-complaint which states as follows. This is page 13:

"These defendants and cross-complainants further allege that there wasn't on said date——" referring to October 1, 1942——

"——any conception in the minds of any officers, or representatives, that either of the parties to said document of public lease, that commercial aircraft would ever within the purported term of said purported lease exceed to any appreciable extent said maximum permissible take-off weight."

On October 1st, 1942, did you have any concep-

(Testimony of Harold Stanley Messersmith.)

tion that within the period of 20 years from that date planes in excess of 25,000 pounds gross take-off weight would ever come into commercial use?

A. Yes, we anticipated that the Boeing Stratoliner, which TWA later operated, would be placed into service. I believe that airplane weighed approximately 47,000 pounds.

However, we did not anticipate that there would be any large volume of numbers of that aircraft because TWA only [184] purchased three or four for their entire system.

Q. Despite this allegation, then, you did on October 1, 1942, have a conception that planes of at least 47,000 pounds were coming into use, is that so?

A. Into limited use, yes.

Q. Yes.

A. Right. However, our facilities would not be able to accommodate a repetition of use of such extraordinarily heavy aircraft.

Q. Isn't it a fact, Mr. Messersmith, that about five years before 1942 you had a conception that four-engine planes would come into use?

A. Well, yes, there had been other four-engine aircraft that had been in operation but had proven satisfactory by the scheduled air carriers.

Q. When did you first know of the Boeing Stratoliner?

A. Prior to 1942.

Q. How long prior to 1942?

A. I would only be guessing, but it was prior to 1942.

Q. Mr. Messersmith, I have here the report of

(Testimony of Harold Stanley Messersmith.)

the San Francisco Public Utilities Commission for the year 1936-1937. I show you page 165, and a picture on that page. Will you describe to the Court what you see?

A. "Transport Plane of the Future."

Q. How many engines does it have? [185]

A. Four engines.

Q. And what does the caption under that picture say?

A. (Reading): "Cutaway view showing type of transport plane now under construction for Transcontinental and Western Air. Will carry 33 passengers and a crew of four."

Q. Do you recognize that type of plane?

A. Yes, that was a plane that had 50 per cent more capacity than the one that was being operated at that time.

Q. And do you know what weight that plane was?

A. I mentioned before that it was approximately 47,000 pounds.

Q. So that at least five years before the execution of this lease the city, by its report, had knowledge of a 47,000 pound, four-engine plane. Is that correct?

A. We had knowledge that it was being constructed. We had no knowledge that it would be a success because other four-engine airplanes didn't prove to be successful. That was still considered experimental. It was several years later that the

(Testimony of Harold Stanley Messersmith.)

airplane was licensed by the C.A.A. and placed in service.

Q. Wouldn't you say from the picture and the designation that appears in this 1936 report that the City contemplated that it would come into commercial service?

A. I would say that we endeavor to get the latest thing on airlines at all times, and that that indicated the latest [186] thinking and that which TWA anticipated.

Q. That was your contemplation at the time of the type of plane that might come into use, is that so?

A. Into very limited use, yes.

Q. Commercial use?

A. Into very limited use. But our facilities at that time consisted of runways that were only 3,000 feet in length, and in 1938 we went before the electorate and were successful in obtaining a bond issue in the amount of \$2,850,000 in general operation bonds in order to expand the Airport to take care of the projections that had been made by the scheduled air carriers.

Q. And that 1938 bond issue which increased the runways was, again, four years before the leasing, was it not?

A. The accomplishment of the work was two years before.

Q. And that bond issue was voted four years before?

A. Yes.

Q. Now, Mr. Messersmith, I show you the report of the San Francisco Public Utilities Commission

(Testimony of Harold Stanley Messersmith.)

of 1937-1938, or approximately four years before the execution of the lease. Will you please read to the Court this paragraph which appears at the top of page 201.

A. (Reading): "The new Boeing Stratoliner now under construction will be the first transport built in the perfectly streamlined shape of an elongated [187] 'teardrop', following nature's own design for a particle traveling through air with the least possible resistance. This big 4-motored ship will have a total of 4,400 horse power, will carry 33 passengers plus a crew of four, and 3,700 pounds of air mail and express. The cabins will be sealed to permit the use of pressure regulating equipment at high 'over weather' flying levels. Gross weight of the craft will be 42,000 pounds. Its wings will measure 107 feet from tip to tip, and its fuselage will be 74 feet in length. In 'upper level' flying it will travel at speeds around 250 miles an hour.

"First of the new 'Stratoliners' is scheduled for completion during the late summer of 1938."

Q. You knew, then, by your own official report, that the Stratoliner would be completed about four years before the lease was executed, is that right, sir—in 1938?

A. Yes, we knew that a limited number—or this one airplane, would be built, right.

Q. Do you see any reference to the DC-4 in that report?

A. Douglas DC-4, yes.

Q. How heavy an airplane was that?

A. It does not say. I believe this was the first

(Testimony of Harold Stanley Messersmith.)

Douglas DC-4 that was proved unsatisfactory in this country. It had [188] inadequate horse power and was sold, I believe, to Japan.

The Court: Take an adjournment to 2:00 o'clock.

(Whereupon an adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [188-A]

HAROLD STANLEY MESSERSMITH

was recalled as a witness on behalf of the defendants, previously sworn:

Cross Examination—(Continued)

The Court: Proceed.

Mr. Dyer: Q. Mr. Messersmith, when we took the noon recess you had identified in the 1937-1938 report of the Public Utilities Commission statements concerning the Boeing Stratoliner and the DC-4.

Mr. Dyer: If the Court please, at this time I ask that this document be marked for identification.

The Court: Let it be admitted and marked.

Mr. Dyer: And I will ask that that portion of that document entitled "San Francisco Airport" which is a specific chapter therein, be admitted in evidence.

The Court: So ordered.

The Clerk: Plaintiff's Exhibit 6 marked for identification.

Mr. Dyer: In evidence.

The Clerk: Where is that particular part, counsel?

Mr. Dyer: I will point it out to you, Mr. Clerk.

(Testimony of Harold Stanley Messersmith.)

It is the chapter entitled "San Francisco Airport", which extends from page 193 to page 228.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in [189] evidence.

(Thereupon PUC Report 1937-38 referred to above was marked Plaintiff's Exhibit No. 6 for identification; and pages 193-228 thereof, entitled "San Francisco Airport" was received into evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Dyer: Q. Mr. Messersmith, you stated that you had in contemplation that DC-4 planes would come into use as early as 1937-1938. I show you this photograph. Would you please state what it purports to represent?

A. A DC-4 airplane of Trans World Airlines supplied through the courtesy of TWA.

Mr. Dyer: I will ask that this document be marked for identification and I will also offer it in evidence.

The Court: Let it be admitted and marked in evidence.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Thereupon photograph of Boeing Stratoliner was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Dyer: Q. Now, Mr. Messersmith, if I recall your testimony correctly, you stated that the weight of the DC-4 plane was in the neighborhood of 54,000 pounds; is that correct?

A. Yes, 54,000 pounds, of standard gross weight

(Testimony of Harold Stanley Messersmith.)

was presumed to be the weight of the airplane at that time.

Q. Was that the maximum take-off weight or landing weight? [190]

A. That would be the landing weight at that time. Later the aircraft was developed into a heavier aircraft.

Q. I think we have been talking generally and the pleadings refer to the gross take-off weight. Will you give us your estimate of the gross take-off weight of that aircraft at that time?

A. The provisions of the lease refer to the standard gross weight of the aircraft; consequently I have been conforming to the standard gross weight of the aircraft in stating the weights of aircraft, not the maximum weight at take-off, because the lease doesn't refer to such weights.

Q. All right; I will put it to you this way: What was the maximum take-off weight to the best of your recollection of that airplane at that time?

A. At what time?

Q. In 1938 when you first obtained notice of it.

A. I had no knowledge of the operation by a scheduled air carrier of any DC-4 in 1938. I don't think any——

Q. Did you have—pardon me, sir.

A. I don't think any air carrier had operated a DC-4 airplane in those days. I think the photograph there that was presented here in evidence was most likely taken subsequent to 1942 and is not indica-

(Testimony of Harold Stanley Messersmith.)

tive of the airplane that you refer to as our having knowledge of in 1936 and 1937.

Q. Does the airplane represented by this photograph have the [191] same general air frame as the airplane which you have described and which you had notice of in 1938?

A. You are referring to the experimental DC-4 that was sold to Japan?

Q. I am referring to the airplane which is referred to in the Public Utilities report which is in evidence.

A. I had no specific figures as to the rate of the first experimental DC-4 airplane. I understood it to weigh somewhere between 54,000 and possibly 65 or 70,000; but I have no published weight data on that specific airplane.

Q. Your contemplation of the weight was within the range stated by you, between fifty-four and say sixty-five thousand or so, is that correct?

A. The contemplated weight was fifty-four to sixty-five thousand pounds. However, the knowledge of the weight of that aircraft was not forthcoming—that is, definite knowledge was not forthcoming until after the aircraft had been certified by the Civil Aeronautics Authority and that was along about 1942, I would judge, or 1943.

Q. That plane was a heavier plane than the Boeing Stratoliner which is referred to in the answer and cross-complaint, was it not?

A. Are you now referring to the first conception of a DC-4 which went to Japan, or are you refer-

(Testimony of Harold Stanley Messersmith.)

ring to the one that was actually placed in airline service. There is quite a span [192] of years between the two.

Q. I am referring to the plane which you first had notice of in 1938 and 1939 and also the one which I understand was put in service. I understand they are one and the same plane.

A. There was quite a bit of discussion on that subject. As a matter of fact, there was a conference in the office of the manager of the Airport about 1937-38 when the question arose as to the practicality of an airplane of the size of a DC-4, and there was considerable question as to whether the scheduled airlines would actually operate airplanes that large, and if they did it was indicated that they would be under circumstances of long-range operations and very limited number of movements.

Q. What weights did you discuss at that time?

A. The weights that I recall I believe approximated 54,000 pounds.

A. A year later in the report of 1938-39 of the Public Utilities Commission did not the Public Utilities Commission during the fiscal year 1938-1939 have definite knowledge that the Boeing Stratoliners and the Douglas DC-4 planes would be used commercially?

A. No; we had definite knowledge that they were—that the Boeing Stratoliner was contemplated for use, but we had no assurance that they would operate in and out of the San Francisco Airport.

(Testimony of Harold Stanley Messersmith.)

Q. You had definite knowledge that those planes had been built, had you not?

A. Yes, but we had no definite knowledge that TWA would be certificated to operate in and out of the San Francisco International Airport at that time.

Q. You had definite knowledge that it was entirely possible that the certificated airlines would use that type of equipment, did you not?

A. We could have anticipated that a limited number of scheduled flights by aircraft of that weight would possibly be operated from our Airport, but we did not have facilities that would accommodate them.

Q. I show you page 192 of the 1938-9 report. What does heading of that paragraph state, sir?

A. "Four-motored transports to be used by airlines."

Q. And what planes are referred to in the paragraph under that heading?

A. "Four-motored transports to be used by airlines. Plans for the use of four-motored transports by the airlines are progressing rapidly. Both of the lines using San Francisco Airport are definitely contemplating this important step. United Air Lines has ordered six Douglas DC-4 transports, thirty-two and one-half ton planes which carry 42 passengers and a crew of five. Transcontinental & Western Air plans to use Boeing [194] Stratoliners, 21-ton planes to carry 33 passengers and a crew of four. Both of these transports are built for high

(Testimony of Harold Stanley Messersmith.)

altitude, substratosphere flying, with hermetically sealed cabins being supplied with circulating air at pressures experienced at ordinary flying levels, and comfortable temperatures. The ships can thereby take advantage of the greater speeds possible in the rarefied regions of the upper atmosphere, and likewise surmount the storm areas which cause many delays in flying at lower levels.”

The Court: Fix the time on that.

Mr. Dyer: This is contained, sir, in the Official Report of the San Francisco Public Utilities Commission for the fiscal year 1938-1939.

The Witness: That is correct. The Stratoliner that was referred to there was first placed in service in approximately 1944.

Mr. Dyer: If the Court please, I will ask that this document be marked for identification.

The Court: Let it be marked.

Mr. Dyer: And I will ask that the chapter therein entitled “San Francisco Airport,” which extends from page 184 to page 224, be admitted in evidence.

The Court: So ordered. [195]

The Clerk: Plaintiff’s Exhibit 9 marked for identification; Plaintiff’s Exhibit 10 admitted and filed in evidence.

(Thereupon PUC Report 1938-39 was marked Plaintiff’s Exhibit No. 9 for identification only; the chapter thereof entitled “San Francisco Airport”, pages 184-224, was received in evidence and marked Plaintiff’s Exhibit No. 10.)

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. Mr. Messersmith, I am going to refer you to a letter, and I have checked its authenticity with Mr. Thomson. It is a letter addressed to the Public Utilities Commission by Mr. E. G. Cahill, Manager of Utilities, and it is dated August 4, 1937, and its subject is the San Francisco Airport Bond Issue. I am going to ask you to read the fourth paragraph in that letter, of August 4, 1937.

A. "With regard to the land plane port, a radical revision has taken place in the design and operation of land type aircraft. Two years we were faced with the airport operating problem of aircraft weighing from 17,000 to 20,000 pounds. Today land planes weighing 24,000 pounds are operating in and out of San Francisco Airport, and there are now being built land planes to be put in service next year, weighing 42,000 pounds, with other designs projected that will weigh close to 70,000 pounds."

The Court: What is the date of that?

The Witness: August 4, 1937. [196]

Mr. Dyer: Q. That is a letter, is it not, from Mr. Cahill to the Public Utilities Commission? It is a copy of a letter?

A. Yes, that is a letter, and it is the estimate on the capital cost, which may be important too, for——

Mr. Dyer: Your Honor, this is a copy of a letter and I have endeavored to obtain the original, but Mr. Thomson tells me it is hard to discover the

(Testimony of Harold Stanley Messersmith.)

original and he has agreed, I believe, to stipulate to its authenticity. Is that correct, sir?

Mr. Thomson: That is correct, Your Honor.

The Court: Let the record so show.

Mr. Dyer: I will therefore offer this copy in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Thereupon letter identified above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Dyer: Q. Now, Mr. Messersmith, do you recall when TWA put in commercial service in the United States the Boeing Stratoliner?

A. To the best of my knowledge it was just prior to the beginning of World War II, and I understand the aircraft were taken over for military purposes and turned back to the airline at a later date. [197]

Q. Do you have a recollection that the Boeing Stratoliner was put in commercial service before the date of the execution of this lease in '42?

A. I believe I recall reading that TWA had purchased three or four of the airplanes prior to that date and had placed them into service.

The Court: What date?

The Witness: Prior to November 1942.

Mr. Dyer: Q. Do you recall reading that in the 1939-1940 report of the Public Utilities Commission?

A. Which year was that?

(Testimony of Harold Stanley Messersmith.)

Q. The fiscal year 1939-1940?

A. Well, I wouldn't necessarily recall the exact date.

Q. To refresh your recollection on the exact date, Mr. Messersmith, I show you this report of the San Francisco Public Utilities Commission for the fiscal year 1939-1940. Will you please read the heading on page 196 indicated by me and the paragraph thereunder?

A. "Era of four-motored transports inaugurated.

"In June 1940 this airline set a precedent among the domestic airlines of the nation by inaugurating the service of four-motored Stratoliners. These huge 21-ton transports, carrying 33 passengers and a crew of five, are now in regular service between Los Angeles and New York. The company has a petition [198] pending with the Civil Aeronautics Authority, requesting permission to extend its New York to Los Angeles route on to San Francisco Airport. If the request is granted, the Stratoliners will be operated into this field. At the present time all east bound Stratoliner passengers are routed by way of Los Angeles, flying south from San Francisco Airport via United Air Lines."

Q. Have you concluded, sir, with that paragraph? A. That paragraph, yes.

Q. That refers specifically to the commercial use of Boeing Stratoliners by TWA, does it not, Mr. Messersmith? A. That is correct.

Q. During the fiscal year 1939-1940?

(Testimony of Harold Stanley Messersmith.)

A. That is correct.

Q. At least two years before the lease was executed?
A. That is correct.

Mr. Dyer: If the Court please I will ask that this document be marked for identification.

The Court: Let it be marked.

Mr. Dyer: And I will further ask that that portion of the document entitled "San Francisco Airport" which extends from page 186 to page 215 be received in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 marked for identification; [199] Plaintiff's 13 admitted and filed in evidence.

(Thereupon PUC Report 1939-40 was marked Plaintiff's Exhibit No. 12 for identification only; the chapter thereof entitled "San Francisco Airport", pages 186-215, was received into evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Dyer: Q. Mr. Messersmith, isn't it a fact that the trend in weight of planes in use at the San Francisco Airport and other municipal airports has steadily increased as to weight and as to wing loadings?
A. Yes, that is a fact.

Q. Isn't it a fact that there never has been any down dip in that trend to any extent?

A. No, that is not a fact.

Q. When was the down dip?

A. There has been deviations.

Q. During the war?

(Testimony of Harold Stanley Messersmith.)

A. No, prior to the war there were larger transports built, and Boeing built a Boeing 80, which was operated by the airlines and subsequently the trend was downward to smaller transports. Then they introduced bi-engine transports, and the trend went the other way. There has been a few variations, but generally I agree that the trend has been upward.

Q. Yes, the general trend. Now, Mr. Messersmith, am I correct in my recollection of your testimony that the use of the field during the war by the Military was rather intermittent, [200] or am I incorrect in that recollection?

A. No, I did not—I said the use of the field by heavy type of transport planes falling into the category of say 47,000 to 63,000 pounds was very limited.

Q. And you are referring then to the limited use of the airport by heavy military planes during the war?

A. That is correct. The use of the field during the war by military aircraft was accelerated after the Federal Government had lengthened the prevailing runway as partial payment for the Treasure Island Airport. At that time they strengthened it to a degree and lengthened the runway to 7,000 feet, and they provided connecting taxi-ways to the now-existing Pan American base. It was only then that those heavier transports could be operated from the airport with any frequency in safety. That was only on a specific runway—one runway,

(Testimony of Harold Stanley Messersmith.)
and on a specific set of taxi-ways running to and from the Pan American Airway. They did not strengthen the balance of the facilities in the areas that were used by scheduled airlines, in getting to and from the operating areas in which they were located or where they loaded their passengers.

Q. Mr. Messersmith, do you have a recollection that during the year 1943-1944 before the Constellations were put in use that there was a rather frequent use of the heavier and larger types of military aircraft at the San Francisco Airport?

A. By heavier and larger type, exactly what aircraft are you referring to?

Q. Those utilized for say cargo activities and evacuation of wounded activities, four-engined aircraft that could fly the Pacific.

A. There was some use of the Aircraft by them in connection with the United Air Lines, and possibly Pan American World Airways. However, almost concurrent with that, we had a project under way with the Federal Government to both lengthen and strengthen the runways and taxi-ways that they would be required to use. However, those were limited operations for military purposes, and we naturally anticipated that we would have an accelerated deterioration of our facilities during the period, but there was a war on and of course no effort was made to forestall that type of operations. In addition, the Federal Government had agreed to pay for any damage sustained through the use of the Airport facilities during that time.

(Testimony of Harold Stanley Messersmith.)

Q. During that time in 1943-1944, isn't it a fact that the use of the runways by TWA Boeing Stratoliners was rather infrequent?

A. Approximately 30 to 60 movements per month. Pardon me; approximately 60 to 120. That would be one to two a day.

Q. I didn't want to have misled you, and I may have been guilty in that respect, but to recall the facts in this case [202] as they have been brought out, isn't it a fact that it wasn't until April 1945 that Boeing Stratoliners were put in use at this Airport?

A. If you will allow me to refer to our report, I can tell you.

Q. Yes?

The Court: Have you that?

The Witness: I have a graphical—

Mr. Thomson: Isn't that in the pleadings, Mr. Dyer?

Mr. Dyer: Yes, I have given him the weights. I brought that to his attention because I didn't want to mislead him.

Mr. Thomson: If it is in the pleadings I am not going to depart from what we agreed to in the pleadings.

The Witness: Yes, our record indicates that Boeing Stratoliner service was inaugurated by TWA in April 1945.

Mr. Dyer: **Q.** Isn't it also a fact that during the fiscal year of 1943-1944 there was rather heavy use of the runways at the San Francisco Airport

(Testimony of Harold Stanley Messersmith.)

by planes of United Air Lines that were flying the Trans-Pacific run for the Military?

A. What volume of traffic do you indicate as heavy use?

Q. Oh, flights of at least 14 landings and 14 take-offs a week.

A. It is conceivable that the volume of activity was conducted. No records were maintained because of the military nature of the operations at that time, so I couldn't tell positively. [203]

Q. You say that no records were maintained? To refresh your recollection, Mr. Messersmith, on the frequency and extent of use of the runways in 1943-1944, before the Stratoliners were put into use, I will ask you to read a portion of the 1943-1944 report of the San Francisco Public Utilities Commission. This portion appears on 198 and continues on page 199.

A. (Reading) "The Company began flying for the Army Air Transport Command between Army Air Depots in this country in the Spring of 1942, and had accumulated in excess of five and one-half million miles of transport operations at the close of June, 1944. This mileage is equivalent to 2,080 San Francisco to New York flights.

"It had also transported 21,000,000 pounds of cargo and 14,000 military passengers.

"Although the domestic operations for the Army Air Force will be terminated shortly, United Airlines continues to conduct Trans-Pacific Air Transport Command flights, and recently completed the

(Testimony of Harold Stanley Messersmith.)

one thousand three hundred fiftieth flight between San Francisco and the South Pacific theater of war. The records reveal that the company has flown more than 10,000,000 miles over the more than 7,350 mile route. Two daily round trips are now being flown with a fleet of Douglas C-54 4-engine transports of the U. S. [204] Army Air Transport Command in keeping pace with the increased tempo of South Pacific combat activities."

Q. Have you concluded with that, sir?

A. I want to elaborate on that, that although that indicates that these airplanes were flown, there were being maintained at the San Francisco Airport and they were operating in and out of the Airport with minimum gas loads and without any pay load. The flights with heavy loads actually were operated from Hamilton Field, as indicated in the next paragraph of that report.

Q. That does refer, however, to flights by 4-engine aircraft, does it not? A. Yes, it does.

Q. And——

The Court: Maybe we ought to read the following paragraph.

Mr. Dyer: Yes, sir.

A. I might add, also, that these operations were conducted on the facilities that were provided by the Federal Government. That is, the runway extensions that they had provided as partial payment for Treasure Island.

Now to read the following paragraph, it states:
"The route which runs from San Francisco Air-

(Testimony of Harold Stanley Messersmith.)
port to Hamilton Field, Honolulu, Canton Island, Tarawa, Guadalcanal and Port Moresby can be flown in approximately 50 hours. In this phase of the [205] Pacific operations, United Airlines has carried 20,000,000 pounds of men, materiel and mail. Passengers totalled 36,000, total weight of cargo was 6,000,000 pounds and air mail 5,700,000 pounds. In addition to its operations in the South Pacific, United Airlines has flown more than 4,500,000 miles, has transported 7,236,887 pounds of mail and express and carried 27,107 passengers for the Army Air Transport Command into the interior of Alaska."

Mr. Dyer: Q. Have you concluded, sir?

A. Yes, sir.

Q. That refers to flights only by United, does it not? A. Yes, it does.

Q. And it refers to flights by 4-engine aircraft?

A. Yes, it does.

Q. And they were all Trans-Pacific flights?

A. They were flights between San Francisco Airport, as indicated, and Hamilton Field.

Q. And points in the South Pacific, is that not right?

A. That is right, but the flights were between San Francisco Airport and Hamilton Field.

Q. Is this the type——. I show you this photograph. Will you please tell me what it purports to represent?

Mr. Thomson: Is this the same one, Mr. Dyer?

A. Trans World Airlines, C-54 airplane. [206]

(Testimony of Harold Stanley Messersmith.)

Q. Is that the type of airplane referred to in the paragraphs which you have just read to the Court? A. That is correct.

Q. And what is the weight of that aircraft?

A. The weight of that aircraft without—with minimum fuel and gasoline, operating in and out of the Airport, approximately 54,000 pounds standard gross weight.

Mr. Dyer: I will ask that this photograph be marked and received in evidence.

The Court: It may be admitted and filed in evidence.

The Clerk: Plaintiff's Exhibit 14 admitted in evidence and filed in evidence.

(Whereupon photograph referred to was received in evidence as Plaintiff's Exhibit No. 14.)

Mr. Dyer: Q. Mr. Messersmith, do you recall that in the year of 1943, from July of 1943 to July of 1944, the Airport had definite plans and in fact let the first contract for the construction of an 8,000 foot runway which would carry planes of 120,000 pounds weight?

A. I do not have any definite recollection of that. I believe that the Public Utilities Engineering Department could possibly confirm whether or not such a contract was let.

Q. Did I say 150,000 pounds, Mr. Messersmith? If I did, I wish to correct myself. I mean 120,000 pounds. A. I am not certain which you said.

Q. To refresh your recollection, I wonder if

(Testimony of Harold Stanley Messersmith.)

you would read this quoted paragraph of the report of the Public Utilities Commission for the fiscal year 1943-1944?

A. (Reading) "U. S. Army Air Force Construction:

"On March 29, the Federal Government, through the U. S. Engineers, awarded a contract to Macco Construction Company and Morrison-Knudsen for 2,500,000 cubic yards of fill and incidental work for the extension of the landing field. Orders have since been issued increasing the fill quantities to 3,089,000 cubic yards and 100,000 cubic yards of excavation. The total cost is estimated at about \$2,650,000.

"The main fill will extend 3,000 feet southeasterly from the southeast corner of the existing field, over the tidelands and will be 1,500 feet wide, adding about 100 acres to the usable landing field. Included in the program is the widening of the existing landing strip from 700 feet to 1,500 feet by placing fill on the adjacent mud area enclosing within the boundary levee. This contract is the first unit of a program which will include the reconstruction of the prevailing wind runway to carry planes of 120,000 pounds gross loaded weight, with a paved landing mat 7,000 feet long and a total [208] useable length of 8,000 feet, the reconstruction of taxiways, and the construction of 40,000 square yards of concrete parking apron designed for the new standard loading stress.

"The Army also constructed a temporary two-

(Testimony of Harold Stanley Messersmith.)

story frame building as an extension of the north end of the Administration Building, to provide additional office space, chiefly for the Weather Bureau."

The Court: 1943 and 1944?

Mr. Dyer: 1943 and 1944, yes, sir.

Mr. Dyer: Q. Now, that was before the time when the first Boeing Stratoliner of TWA went into service at the San Francisco Airport, was it not? A. That is correct.

Q. And approximately a year before that time the Airport had let a contract concerning the construction of a runway that would take planes of 120,000 pound weight, is that so?

A. That is correct. That contract was undertaken as a result of capital or finances made available by the United States Government as partial payment for Treasure Island Airport.

Q. Yes. And the planes that were contemplated to be taken by that runway, that is, planes of 120,000 pound weight, were in excess of the weights of the Boeing Stratoliners that thereafter came into service by TWA, is that not so? [209]

A. That is correct. The Army had contemplated use of the San Francisco Airport, that particular runways, for B-29 operations should the war situation in this area become critical. That was one of the justifications for building such a tremendously long runway in those days, the use by a B-29.

Q. You had a runway then in 1943 and 1944

(Testimony of Harold Stanley Messersmith.)

that would take not only the Boeing Stratoliner but also these very heavy Army planes that you have adverted to, is that correct?

A. Would you repeat that question, please?

(Question read by the reporter.)

Mr. Dyer: Q. I should say, contemplated runway.

A. Not a runway that would accommodate a repetition or any volume of landings by such heavy aircraft. They could not have been accommodated with the runways that existed in 1942-1943. To do so would not be a safe operation. They were not built to accommodate loads of—that is, repeated loads of more than 28,000 pounds of standard gross weight.

Q. Now, Mr. Messersmith, with reference to that statement I am going to ask you to read a paragraph from this report of 1943-1944 which appears on page 190. This is with reference to the use of the runways at that time by heavy military aircraft.

A. (Reading) “The operational activities of the military air forces remained static, but substantial increases were recorded in the operation of the heavier [210] and large types of military airplanes, particularly those operated under the jurisdiction of the Air Transport Command for domestic air evacuation purposes, Air Cargo Transport, and in the maintenance of 4-engined transports for Trans-Pacific service.”

Q. When did you first obtain information, Mr.

(Testimony of Harold Stanley Messersmith.)

Messersmith, that the Constellations were in use and contemplated?

A. I do not recall when we first obtained such information. I believe that it will be indicated in one of the reports of the Public Utilities Commission, which would indicate that same information. As I understand it, that data had been acquired on information from the Public Relations Departments of TWA and other airlines.

Q. Can you give me an estimate of when you first obtained such information?

A. I cannot recall. By reference to P. U. C. reports we could tell you definitely without guessing.

Q. Can you fix it within a period of five years? I don't wish to press you unduly, but I wonder if you could give us an estimate within that range?

A. Yes, sir, within five years. I would say 1943-1944.

Q. That is pretty accurate, Mr. Messersmith. I show you this picture which appears opposite page 191 of the 1943-1944 report, and what is purported to be shown thereon? This picture (indicating).

A. Yes, I see the picture. Well, this is a TWA Constellation taken before the airplane was licensed for commercial operations. That was in 1944 that it was supplied to the Airport. The latter part of 1944.

Mr. Dyer: If the Court please, I will offer this document entitled "San Francisco Public Utilities Commission, Fiscal Year 1943-1944" for identifica-

(Testimony of Harold Stanley Messersmith.)

tion. I will ask that those portions entitled "San Francisco Airport", which extends from page 189 to page 230, be received in evidence.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 15 marked for identification. Plaintiff's Exhibit 16 admitted and filed in evidence.

(Whereupon document referred to above was marked Plaintiff's Exhibit No. 15 for identification only.)

(Whereupon portion of Exhibit 15 for identification entitled "San Francisco Airport" was marked Plaintiff's Exhibit No. 16 and filed into evidence.)

Mr. Dyer: Q. Now, that picture appears in the 1943-1944 report. Do you know how long before then the City received any information concerning that plane?

A. No, I do not know, although these reports are usually brought out about four months before the close of the fiscal year and the information is acquired from the airlines, and in this instance it was undoubtedly the latest information that TWA had, and it depicts the TWA airplane before it had been [212] licensed by the C.A.A. for air carrier operations.

Q. Had you had any discussion with any of the representatives of TWA before 1944 or 1943 concerning the existence of the Constellation?

A. Undoubtedly there was some during that time. If we received the picture at the end of 1944

(Testimony of Harold Stanley Messersmith.)

I would presume that we had heard about it before received that picture.

Q. Do you have any knowledge or information or recollection at this time of when that plane, the Lockheed Constellation was first test flown?

A. I do not have that information.

Q. In normal course of your business would you have known of the test flight at the time it occurred? Would that type of information generally come to you in your capacity as superintendent of operations?

A. It frequently would, but I couldn't recall the exact date.

Q. Would you say it is reasonable that in some fashion, then, before 1944 knowledge of the Constellation came to you?

Mr. Thomson: That calls for guesswork on the part of the witness. He has definitely testified he hasn't any knowledge.

The Court: Do you have any knowledge now?

A. I have no knowledge that TWA had ordered any of those airplanes or that that plane—that they planned to operate it from the San Francisco Airport at that time. [213]

Mr. Dyer: Q. Did you have any knowledge of the existence of that plane before it was test flown, while it was in the production stage?

A. I believe that I had some knowledge of it. I think that some of the first Constellations may possibly have gone to the Army or the Navy. But I cannot recall exactly when the knowledge first

(Testimony of Harold Stanley Messersmith.)

came to my attention, or information came to my attention.

Q. I don't think I should ask you for your exact knowledge, Mr. Messersmith, but do you have any recollection of that period? Was it 1942, 1943, 1941 or when?

A. There was a tremendous acceleration in the growth of aviation right about that time, and it was over a period of a few years, within 1942-1943.

Q. So that your testimony is that during the period of 1940 to 1943 it is not unlikely that you received information of the Constellation?

A. I do not recall receiving any information to the effect that Constellations would be operating from the Airport by TWA, and the facilities that we had at that time were inadequate to take care of the operation of a TWA Constellation. It would have been a hazardous operation to endeavor to operate them with the facilities we had at that time.

Q. As I recall, Mr. Messersmith, my question was your knowledge at that time during the period of 1940 to 1943 of the existence of the Constellation. [214]

A. I have endeavored to answer that to the best of my ability. I cannot pin it down to an exact date.

Q. But you did have knowledge during that period?

A. Sometime during that period I had knowledge that the Constellation was under development.

Q. And that knowledge was before it was test flown, is that correct?

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: I didn't understand, Mr. Dyer.

Mr. Dyer: Q. And that knowledge of the existence of the plane and its plannings, the production stage, was before the date it was test flown, is that correct?

A. I do not recall definitely whether it was before——

Mr. Thomson: Before it was what?

Mr. Dyer: Test flown.

A. ——or immediately at the time it was test flown.

Mr. Dyer: Q. Mr. Messersmith, to refresh our recollection on the date that the Constellation was first flown, I show you this document which purports to be a document issued by the Chief Research Engineer of Lockheed Aircraft Corporation, entitled, "Development of the Lockheed Constellation". Would you please——

Mr. Thomson: (Interposing) May it please the Court, I object to the use of that document in the manner here attempted. Virtually, it is an indirect attempt to introduce the document itself into evidence. He could ask the witness generally by [215] way of proper cross-examination whether that ever came to his attention, but to endeavor to read a document of this type is equivalent to its introduction in evidence, and the Courts I think quite consistently have held that that cannot be done. If we are going to have a battle now of pamphlets we are going to be here a couple of weeks.

Mr. Dyer: I have no such intention. Your Honor.

(Testimony of Harold Stanley Messersmith.)

I think the objection to the point that it was directed is well taken. I merely wish to direct to the attention of the witness the purported date on which it was flown.

The Court: You might ask him directly.

Mr. Dyer: Q. There is a reference in here to the first flight of the Constellation——

Mr. Thomson: Just a minute. I think that is beyond the realm—I suggest the only question that could properly be put to the witness is whether or not he has knowledge of a certain document.

The Court: Have you?

A. No, I have not. Much of the information regarding the new types of aircraft at that time was restricted information, and to the best of my recollection the publications that I had concerning the weight of the Lockheed Constellation did not come out until possibly in 1944. It was considered restricted data prior to that time.

Mr. Dyer: Q. Did you ever receive any information concerning [216] the weight of planes from an organization called The Institute of Aeronautic Sciences?

A. I do not recall receiving any information from the Institute of Aeronautic Sciences during the period in question.

Q. Now, Mr. Messersmith, as I recall your testimony this morning you stated that it was the steady or frequent use of runways that had the tendency to do the damage described by you. Isn't it a fact

(Testimony of Harold Stanley Messersmith.)

that TWA is not the most frequent user of the Airport?

A. That is a fact. TWA is one of the major users of the Airport. However, they are not the most frequent user of the Airport, and in trying to determine how much damage was sustained by the Airport as opposed to the tremendous reconstruction that we had to undertake to accomplish, or to make the field safe for the operation of the heavy aircraft, that reconstruction for the damage was a small proportion of the total cost that had to be expended to make the Airport safe for the operation of the heavy type of aircraft that TWA and others operate.

Q. I am referring now to your testimony concerning the frequency of use by various airlines. I have here a copy of Plaintiff's Exhibit 1. The answer and cross-complaint alleges that, with reference to the alleged damage by TWA planes, that Boeing Stratoliners were put in use in April of 1945. Now, as shown by this exhibit— [217]

The Court: Exhibit what?

Mr. Dyer: Plaintiff's Exhibit 1, sir.

The Court: What is Plaintiff's Exhibit 1?

Mr. Dyer: It is a statement of the number of TWA schedules per month for the period January 1, 1942, through December 31, 1952.

The Court: Proceed.

Mr. Dyer: Q. Now, as shown by this exhibit, Mr. Messersmith, how many DC-3 airplanes of

(Testimony of Harold Stanley Messersmith.)

TWA by schedule would utilize the Airport during the period April 1st, to May 1st, 1945?

A. Approximately 300 movements of DC-3 aircraft.

Q. Is that shown on this exhibit?

A. No. Why, yes, it is. It is shown as scheduled, but the movements or wear and tear on the Airport is not reflected by five schedules as indicated here. Those are—each one refers to two movements. Each schedule per day for 30 days, or five times sixty, 300 movements per month. Five times sixty.

Q. How many flights per day of DC-3s would that be?

A. The common denominator for use and wear and tear on the runway would be movements, and I would say this reflects 10 movements of DC-3s per day.

Q. To refresh our recollection, what is the weight of the DC-3 aircraft?

A. Approximately 25,000 pounds standard gross weight. [218]

Q. Yes. And that was a relatively light plane, was it not, in comparison with the other planes now used by scheduled airlines? A. Yes.

Q. And how many schedules are shown on here as being flown by Boeing planes from April to May of 1945? A. Did you say April or May?

Q. April to May, 1945. A. 60 movements.

Q. I see. That would be approximately one landing and one take-off a day, would it not?

A. That is correct.

(Testimony of Harold Stanley Messersmith.)

Q. Similarly there are two movements per day shown for May to September for that period of 1945, isn't that so? A. That is correct.

Q. So that during that period there are only two landings and two take-offs of a Boeing plane of TWA?

A. Well, I would like to point out that where the damage was sustained to a great extent was on the loading apron where the aircraft were parked for prolonged periods of time.

Q. We will get to that, Mr. Messersmith, but I would like to ask you to answer the question. I am referring to the landings or take-offs which are part of the issues raised here.

So that in that period adverted to by me and shown on this exhibit there are simply two landings and two take-offs of [219] TWA planes, isn't that correct—Boeing TWA planes?

A. Boeing 307.

Q. And the same is true for September to October, 1949, is it not? A. That is correct.

Q. And also for October, 1945 through May, 1946, isn't that correct? A. Correct.

Q. Now, isn't it true that that was a small percentage of the utilization of the runways during that period?

A. It probably represented approximately one-third of the movements of aircraft in this weight category.

Q. I see. What was the percentage of the total movement from the aircraft.

(Testimony of Harold Stanley Messersmith.)

A. I do not have those figures available right here. The aircraft that were within the weight limitations of the facilities couldn't—did not necessarily contribute to our requirements for reconstruction and replacement of facilities. Therefore, I have related it to the type of aircraft that exceeded the weight limitation of the facilities that we had at the time.

Q. Mr. Messersmith, I would like an answer to the question. Can you tell me what percentage of the total movements of the Airport are represented by the movements of Boeing planes during the period of April, 1945, to May, 1946. [220]

A. I would have to refer to our records, the Public Utilities Commission Annual Report, to determine that.

Q. Do you have any recollection of it at the present time, or any estimate of it?

A. The percentage of TWA movements to the total?

Q. Of Boeing movements to the total, TWA Boeing.

A. That is like comparing apples and grapefruit. Pardon me, but they are two different categories.

Q. Is your answer that you have no recollection of it at the present time?

A. By referring to the fiscal report of the Public Utilities we can answer that correctly. It is right in the reports.

Q. Mr. Messersmith, I am perfectly willing for

(Testimony of Harold Stanley Messersmith.)

you to check your report, but I am asking you for your estimate at this time. Do you have such an estimate in your mind?

A. A very small percentage of the total movements.

Q. Thank you. Now, there is an allegation in the answer and cross-complaint that in June, 1946, Constellations were put in service at the San Francisco Airport. As shown by Plaintiff's Exhibit 1, how many take-offs of Constellations took place that month when the Constellations were first put in service.

A. The record that you presented indicates approximately 30.

Q. And that would be one take-off of one plane and one landing of one plane, is that correct?

A. That is correct. 60 movements per month, two per day. [221]

Q. Similarly, the same is true of the next month, June to July, 1946.

Mr. Thomson: Well, if Your Honor please, I think this exhibit speaks for itself. He is simply asking the witness continually to read from the exhibit. I think the prolongation of the cross examination is needless.

Mr. Dyer: Your Honor, I think we are entitled to cross examine this witness and to show that due to the very infrequency of use of the runways it couldn't have been any substantial damage done by TWA planes. The testimony was that it was the

(Testimony of Harold Stanley Messersmith.)

use of runways by—frequent use of runways that contributed to the damage.

The Court: You suggested to my mind that the damage was done on the loadings.

A. I made mention of the fact that the apron in front of the Terminal Building was damaged by the heavier aircraft operated by TWA and one other airline. I only referred to that one specific piece of paving because no other aircraft operated on it, and there we could demonstrate the effect that would occur throughout the entire airport.

In other words, this is just a small segment of the field, or of the loading apron. Then we could point to it and say the airlines utilized that exclusively. No one else used it, Your Honor. Then we apply the same thing to our entire facilities that were constructed and accommodate the same load, and we [222] could assume or expect that the same thing would occur throughout the Airport by having these excessive weights use the Airport.

Therefore, we initiated action to improve the total Airport so that they could operate in safety.

The Court: Proceed.

Mr. Dyer: Q. Now, Mr. Messersmith, with reference to that statement, the Public Utilities Report of the City show you had contemplated runways capable of taking planes of 120,000 pound take-off weight, isn't that so?

Mr. Thomson: I believe in this instance counsel should fix the date.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. I believe it appears in the 1943-1944 report which is in evidence.

A. That was indicated in there as being our objective.

Q. Yes. Now, isn't it a fact that pavement on the runways is entirely different than the pavement on the ramps?

A. I would recommend that, for comparison for the type of pavement, that that matter be referred to the Public Utilities Engineering Bureau.

Q. I am asking you?

A. They have—. There is a different type of pavement, but the load bearing ability of the pavement is about equal or is equal.

Q. It is equal? Then would you say that the ramps are [223] capable of taking planes of 120,000 pounds?

A. Not at this time, no. No, they were not at this time. But on the ramps you had more of a concentrated load. There where the airplanes were parked for a prolonged period you had repetition of strain and stress in that particular area, whereas on the runways they would not necessarily land at the same point all the time.

One time they would land here, another time at a different point. So that you could not have the greater repetition of strain and stress on your runways and taxiways than you could have on your focal points such as loading ramps, unless with the matter of time and with increased activity it would also occur on your runways and taxiways. [224]

(Testimony of Harold Stanley Messersmith.)

Q. Do you recall, Mr. Messersmith, that during the war the ramp areas were used to a great extent by heavy military planes of the C-54 type?

A. The ramp area in front of Hangars 1, 2 and 3 and south—well, 1, 2, 3 Combat, which were constructed in the same manner as TWA's apron and the ramp in front of the Terminal Building, were used by P-39's and P-38 airplanes almost exclusively. Those were not really a heavy type of aircraft such as the Stratoliner or the Lockheed Constellation.

Q. Isn't it a fact that the areas used by the military planes and the ramp areas broke up during that period?

A. The particular apron area, except in front of the Terminal Building and in front of TWA's hangar did not break up during that period. As a matter of fact it wasn't replaced until two years ago, and then it was damaged by the introduction of DC-4's, Lockheed Constellations, DC-6's, and those aircraft operated by the airlines.

That apron there actually did hold up until two years ago. It was the same type of construction as in front of the Terminal Building where we had the accelerated deterioration because of heavy loads.

Q. And you have no recollection at this time of those areas breaking up because of the heavy use by C-54 planes bringing in litter cases?

A. They did not use the area in front of Hangars 1, 2 and 3, [225] which were similar to hangars of—

(Testimony of Harold Stanley Messersmith.)

Q. (interposing) Don't you recall discussing that matter with Mr. Moran of TWA, the breaking up of the area by the C-54's?

A. Yes. That area involved was the area that was utilized by TWA and by Western Airlines in front of their own hangars on property that was in their exclusive use.

Q. What do you mean by exclusive use? Isn't it a fact that under the lease and according to your recollection those areas could also be used for access to No. 4 and the field by other planes?

A. No. For a matter of several years, or since the termination of the war, the property involved has been rented for the exclusive use of a specific air carrier or a specific tenant.

Q. Well, now, isn't it a fact, Mr. Messersmith, that the other airlines at the Airport had the right to use the ramp in front of Hangar No. 4 as a taxi-way?

A. In the lease agreement it is stipulated that TWA would have the ingress and egress of that particular apron to their hangar, and if anyone else had used it they would have blocked the ingress and egress to TWA's hangar. I don't believe TWA would agree to that.

Q. Well, do you recall this provision in the lease?

Page 2, paragraph 1—referring to the right of parking [226] aircraft on the ramp of that hangar?

"Such right, however, not to be exercised so as

(Testimony of Harold Stanley Messersmith.)

to interfere with the public use of said ramp as a taxi-way?"

A. That is correct. But they did not park aircraft there, and it is at the locations where TWA parked their aircraft to service them outside the hangar, and the ingress and egress area, that we had to replace the paving on more than one occasion, and is where the deterioration set in. Subsequently the entire apron, because of the use of heavy aircraft and the introduction of heavy aircraft, had to be completely reconstructed.

Q. Mr. Messersmith, all these areas that were improved and reconstructed, and so forth, as alleged in the answer and cross-complaint, were so improved and reconstructed and enlarged from funds obtained from the bond issue of 1945, isn't that correct?

A. That is our general obligation fund, yes. Not all of them, no, sir. I would like to correct that. Some of the work was accomplished with 1938 bond fund appropriations and the 1945 as well.

Q. Well, I will accept that, of course.

Isn't it a fact that within the purview of your answer all the funds to enlarge and reconstruct these runways and taxi-ways and ramps, and so forth, came from some bond issue? [227]

A. No, at one time or on a few occasions the Board of Supervisors appropriated reconstruction and replacement funds to take care of required reconstruction and replacement. I believe they appropriated in excess of one hundred thousand dol-

(Testimony of Harold Stanley Messersmith.)

lars so that we could keep our storm wind and 18-36 runway in service for a period of approximately eight months over a winter so that the air carriers could utilize or continue operations while we had adverse weather conditions. That was a temporary repair merely so that the airlines could continue operation over the winter period, because at the same time we had under construction a new runway that would be placed in service approximately one year after that date, and prior to the next winter.

Q. Isn't it a fact that the major portion of these funds were obtained from the '45 bond issue?

A. Yes, a major proportion of the 18 to 20 million dollars used to enlarge, reconstruct and strengthen the general or common use facilities of the Airport came out of bond funds.

Q. Those bond funds were sponsored by the Public Service Commission, were they not, among other civic bodies?

A. Yes, to my understanding they were.

Q. And isn't it a fact that the public was advised by the Utilities Commission and other civic-minded bodies and officials that these improvements were necessary because of civic betterment considerations? [228]

A. Well, there were many logical reasons presented to the public in order to obtain their support while they continued development of the San Francisco Airport.

Q. And among those reasons was not the public

(Testimony of Harold Stanley Messersmith.)

advised that these funds were necessary in order that San Francisco obtain a major airport?

A. Yes; at that time, as I recall, we gave the public assurance that with the expenditure of the 1945 and 1949 bond funds we would strive to make the Airport financially self-sustaining. That is one of the goals that was set and which we indicated to the public would be accomplished if they approved it—approved the issues.

The Court: Q. What is the situation now? Is it self-sustaining?

A. In 1952, the deficit was \$696,000, approximately, Your Honor. That does not include the redemption of any general obligation bonds, but it does provide for maintenance and operation of the Airport, administration and for depreciation on the facilities.

Q. Why aren't the bonds included?

A. The bonds are being redeemed, as I understand it, as rapidly as possible, and they were general obligation bonds at the time.

Q. Well, I don't know so much about these financial matters. Why isn't that part of the deficit?

A. Well, it could conceivably, let us say, be treated as part of the annual deficit. After all that amount of money—let us say the—I cannot tell you exactly what the amortization of the bonds is, but it is approximately two million dollars per year, and if we added that to our total deficit, it would be close to—in excess of two million dollars a year, if we added the redemption of the bonds.

(Testimony of Harold Stanley Messersmith.)

The Court: There is some Scotch in me. That is the reason I wanted to know about this.

Mr. Dyer: Q. Without going into an excursion on that subject, Mr. Messersmith, isn't it a fact that in the year 1951-52 the revenues received by the airport exceeded expenses, exclusive of bond redemption and interest?

The Court: Exclusive of bond redemption?

Mr. Dyer: Yes.

A. Excluding bond redemption, interest or anything for reconstruction and replacement, which could be termed as depreciation. It was sufficient to take care of the current maintenance and operation, but not all of the other cost factors involved.

Mr. Dyer: Q. I have here, Mr. Messersmith, the 1951-1952 Annual Report of the Commission. I wonder if you would read this paragraph with reference to the financial situation at that time.

A. "For the year, exclusive of—" [230]

The Court: What year? Pardon me?

The Witness: This is the Annual Report of the fiscal year 1951-1952 of the Public Utilities Commission. It states:

"For the year, exclusive of bond interest and bond redemption, actual expenditures totaled \$737,-251.31, as compared with actual revenues of \$993,-259.90."

I would like to mention there that that was very carefully worded to state "for the year, exclusive of bond interest and bond redemption," which as

(Testimony of Harold Stanley Messersmith.)

an item in excess of two million dollars, and it does not include any depreciation provisions.

I might add that we make that report out in that manner because frequently the status of one airport is compared with other airports throughout the country who do not necessarily indicate the depreciation or the bond redemption; and if we don't put it in the same category as other airports, it appears as though we are doing a poorer job than some of the other communities.

The Court: You might add to that the dear taxpayers who pay the jingle on these matters do not know about it either, do they?

The Witness: Well, the Controller of the City and County of San Francisco frequently——

The Court: Who is that?

The Witness: That is Mr. Ross—frequently brings to [231] our attention the fact that the expenditures are that.

Mr. Dyer: Q. Mr. Messersmith, were you responsible for this statement in the '51-52 report: it refers to the fact that the Airport is responsible for 75 million new dollars coming into the economic channels of the community each year.

Mr. Thomson: I think that is quite immaterial, Your Honor.

The Court: That is a good sales talk.

Mr. Thomson: I probably should not have objected to it. Withdraw the objection.

Mr. Loring: Do you stipulate to the accuracy of that remark?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Do you stipulate to the accuracy of that remark, Mr. Thomson?

Mr. Thomson: I will stipulate the Airport is a very fine thing for San Francisco.

Mr. Dyer: Q. Now, Mr. Messersmith, as I recall your testimony, you stated that the major portion of these funds for the improvement of the Airport come from the 1945 bond issue. How long before that bond issue were those improvements planned?

A. Oh, I believe earlier today I told you I would estimate three years.

Q. Three years. So you would say that in 1942 the improvements which now exist at the Airport because of the expenditure of those funds were planned, is that so, or were in the planning [232] stage?

A. I never heard of any contemplated 20 million dollar expenditure for the improvement of the Airport until some time in 1944.

Q. But did you discuss—

A. The plans—pardon me,—and any plans prior to that time were very vague and we had no real basis upon which to proceed, but approximately the end of 1944 the trend in aviation, I believe, began to crystallize.

Q. So that you did have some definite plans for the construction of these facilities and improvements in 1944?

A. Approximately the end of '44.

Q. Isn't it a fact that you had those plans before

(Testimony of Harold Stanley Messersmith.)

the first Boeing Stratoliner was put into use in April 1945?

A. It is possible that we had some plans along that line before that time. We have continually strived and stressed the development of facilities that will provide for the safe operation of aircraft at the San Francisco Airport.

Q. Similarly, isn't it true that you had definite plans for the improvement of those facilities and the extension of those facilities before the Constellations were put in use?

A. The definite plans were a matter that was referred to in Mr. Jens letter; subsequent to the approval by the electorate of the 1945 bond issue, our plans were submitted to the air carriers for review in 1946. At that time TWA recommended [233] that the distance between the runways be increased to 1500 feet instead of the 700 feet contemplated. That is the time that the crystallization of the plans for the development took place. It is obvious that the airlines would have to be a part of such planning, because they are the principal customers of the Airport.

Q. And that plan was known in 1944 before the Boeing came into use and before the Constellations came into use, isn't that so?

A. In a preliminary manner, yes, but not conclusive.

Q. Didn't you have definite plans at least as early as December 1st, 1944 for the construction of those facilities before the Boeings came into use?

(Testimony of Harold Stanley Messersmith.)

A. It is possible that we were working on preliminary plans at that time.

Q. To refresh your recollection, do you recall that on December 1st, 1944 there was an extensive meeting at the Airport attended by the Mayor, Mayor Lapham, and Mr. Cahill, Manager of Utilities, and eight Supervisors, and at that time extensive public statements were made orally concerning the facilities to be constructed at the Airport?

A. I wouldn't remember the exact date. I don't recall that on that specific date, but if it occurred, well——

Q. Pardon me. Would you continue? Had you finished?

A. If you have evidence that that occurred, well, I state [234] that we were making plans in a preliminary manner at that time.

Q. And there were public statements made at that time, is that not so, sir, concerning the expansion of those facilities?

A. Well, I do not recall.

The Court: Did they call you into the meeting, do you recall?

The Witness: Yes, I attended the meeting if it is—I attended one meeting at approximately that date concerning—whether it would be six months or a year later I could not tell.

Mr. Dyer: Q. And that was before the Boeing Stratoliners were put into use, isn't that so?

A. Yes. Well, I have already testified and there

(Testimony of Harold Stanley Messersmith.)

is evidence that the Boeing Stratoliners were put in limited service prior to that time. I don't believe TWA ever acquired more than four of those Stratoliners.

Q. Isn't it a fact that Boeing Stratoliners by TWA did not come into operation until April 1945?

A. At our Airport. I am talking about Boeing Stratoliners in general.

Q. My question is concerned with Boeing Stratoliner utilization in San Francisco. This meeting of which you have some recollection and these preliminary plans, at least, were in existence before the Boeing utilization of San Francisco, is that not so?

A. Yes.

The Court: It is now time for adjournment. I see you are having some difficulty in knowing what direction you are going in. We will take an adjournment.

Mr. Dyer: I am just about to land, Your Honor.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Thursday, September 10, 1953.) [235-A]

The Clerk: Trans World Airlines, Incorporated versus City and County of San Francisco, further trial.

Harold Messersmith to the stand, heretofore sworn.

HAROLD STANLEY MESSERSMITH

resumed the stand on behalf of the defendants and cross-plaintiffs, having been previously sworn, testified further as follows:

Cross Examination—(Continued)

Mr. Dyer: Q. Mr. Messersmith, I wish to make clear a matter that was adverted to yesterday. Is it a fact that at the present time United Airlines is operating in the San Francisco Airport and is utilizing both space and facilities under a lease agreement? A. Yes.

Q. And they pay for both space and facilities under that lease agreement; is that correct?

A. Yes.

Q. And I am referring specifically to common use facilities as well as space? A. Yes.

Q. And the term of that lease is for 40 years?

A. That is correct. [236]

Q. And the amount provided by that lease for payment by the United is less than the present schedule of rates and charges?

A. Yes, it is.

Mr. Thomson: For the sake of clarity, Mr. Dyer, you mean that by 40 years the period created by the lease itself; it hasn't 40 years more to run?

Mr. Dyer: That is correct, Mr. Thomson. I was referring to the lease term as stated in the lease.

Mr. Thomson: Yes.

Mr. Dyer: I will enter into the stipulation that it was entered into, I believe, in 1947, if you will accept that. •

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: I believe that is the correct data offhand. I will stipulate subject to any necessary correct.

Mr. Dyer: Q. Mr. Messersmith, at the close yesterday we were discussing the time when the City had contemplated and planned the expansion and the improvement of the facilities of the San Francisco Airport. Do you recall a letter that was written on December 11, 1944 to the Board of Supervisors of the City and County of San Francisco and signed by Mr. Cahill, Manager of Utilities, Mr. Doolin, Manager of the Airport Department, and by the President and members of the Public Utilities Commission?

A. May I see the letter?

Q. Yes, of course. This is a print of that letter, sir, contained in the official report of the Public Utilities [237] Commission for the fiscal year 1944 and 1945. It commences on the page which I am indicating.

A. Yes, I recall this.

Q. And that was a definite recommendation to the Board of Supervisors by the Public Utilities Commission on December 11, 1944, that the facilities and improvements at the Airport be constructed with the proposed \$20,000,000 to be derived from a bond issue; is that not correct?

A. That is correct.

Q. And the date of that letter was December 11, 1944, was it not?

A. That is correct.

Q. And that was before the Boeing Stratoliners

(Testimony of Harold Stanley Messersmith.)

and been in service at San Francisco, is that not correct?

A. That is correct; we were preparing for them.

Q. And also before the Constellations were put in service at San Francisco?

A. Yes, it was. The capital expenditure was requested in order to be able to accommodate the heavy type of aircraft that the scheduled air carriers planned to operate.

Q. You had in contemplation those heavy aircraft about that time, is that correct?

A. Yes, we did.

Mr. Dyer: I will ask that this document be marked for identification, sir, and I will ask leave of Court that that [238] portion of this report entitled "San Francisco Airport Department," which extends from page 183 of that report to page 238 be received in evidence.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 17 marked for identification; Plaintiff's Exhibit 18 admitted and filed in evidence.

(Thereupon the report referred to above was marked Plaintiff's Exhibit 17 for identification only.)

(Thereupon chapter of report entitled "San Francisco Airport Department," was marked Plaintiff's Exhibit 18 and admitted into evidence.)

Mr. Dyer: Q. Mr. Messersmith, as I understand one of the assertions of the City, it is that

(Testimony of Harold Stanley Messersmith.)

the City and County of San Francisco to some extent exercises a police power at the Airport. Isn't it a fact that the Airport is policed by members of the Sheriff's Department of the County of San Mateo?

A. The San Francisco Airport is located in the unincorporated portion of San Mateo County. The police functions that are carried out by the employees of the Airport are the enforcement of rules and regulations and the proper control of the public. We have to control traffic. We have to see that vehicles and other people are restricted from going on the flying field or common use facilities of the Airport. That protection is necessary at the Airport in order for the scheduled airlines and others to operate safely and efficiently. The Sheriff's [239] Office does not assume that responsibility at the San Francisco Airport.

The Court: May I inquire the purpose of this testimony?

Mr. Dyer: Yes, sir. One of the claims of the City, if the Court please, is that in the operation of this Airport that police power is exerted. We wish to show that in some of the phases of the operation of the Airport which would obviously involve the exercise of police power, that that simply is not the fact.

Mr. Thomson: If Your Honor please, if the term "police power" happens to be in my pleadings—I'm not sure as to whether or not that term is incorporated, but if that is true, I used the term

(Testimony of Harold Stanley Messersmith.)

“police power” in the general sense, not that it indicated exercise of authority by a police officer; but I find the law to be that the rate fixing power is part of the police power. If the term “police power” appears in the pleadings, I used the term “police power” in that sense.

I think Your Honor’s curiosity as to the purpose of this particular testimony is well taken.

Mr. Dyer: We are not concerned with people in uniform down at the Airport keeping the public in line.

The Court: I am unable at this time to fully appreciate the significance of this testimony.

Mr. Dyer: Well, sir, police power, as we understand it, is a power which is exercised for the protection of public [240] health, safety and morals, as I understand it, sir. And one of the points that I believe can be made in this case is that since the Airport is located wholly without the municipal boundaries of San Francisco and wholly without the reach of the Governmental powers of that party, that any claim that police power extends thereto is not a valid claim, and in support thereof I think we should bring to the attention of the Court the fact that in the exercise of obvious police power, let alone some which might be in question such as the regulatory power here, that the police power of the City and County of San Francisco was not exerted at that location.

The Court: Where is the pleading that brings that into question?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: I think it is implicit, sir, in the issues presented to the Court. The pleadings do not verbatim say that police power is exerted there, but I think that that is a matter that the Court ultimately must consider.

Mr. Thomson: Haven't you proved enough, counsel, when you prove that the Airport is located in the County of San Mateo? Isn't that sufficient for your purposes in raising any appropriate legal question?

Mr. Dyer: I do not think so. I think in addition we should bring to the attention of the Court the fact that the Airport is not policed and the police power is not exerted at that location. [241]

Mr. Thomson: We will stipulate that that power ceases outside the boundaries of our city.

Mr. Dyer: Will you further stipulate that Deputy Sheriffs of the County of San Mateo and not police officers of the City and County of San Francisco do any policing necessary?

Mr. Thomson: That is true; they are deputies appointed by the County of San Mateo because it is within its territorial jurisdiction. I will so stipulate.

Mr. Dyer: With that, I will not pursue——

Mr. Thomson: I believe, however, I will add that those security officers are in part paid by the City and County of San Francisco. They are carried upon the payroll of the City and County of San Francisco in whole or in part, Mr. Messersmith?

A. They are paid in whole by the City and

(Testimony of Harold Stanley Messersmith.)

County of San Francisco. They are there to protect the life and property of those using the facilities of the Airport, and they perform duties that the Sheriff of San Mateo County does not consider his responsibility.

Mr. Dyer: I will move to strike that latter statement as a volunteer statement and as not responsive.

Mr. Thomson: That may go out.

The Court: It may go out.

Mr. Dyer: I will accept the stipulation and not pursue this matter further, sir. [242]

The Court: Very well.

Mr. Dyer: Q. Mr. Messersmith, with reference to your testimony of yesterday concerning your journey on the TWA coach flight to Chicago——

Mr. Thomson: Kansas City.

Mr. Dyer: Q. Kansas City; I beg your pardon,—do you have any personal knowledge of the total fares paid by the passengers in that plane at that time?

The Court: It is limited to your knowledge.

A. Only on the basis that I indicated yesterday, and that the fact that the first stop of the flight was Kansas City, so that none of the passengers could have paid less than the amount I said, approximately \$70 per passenger, and many of them who did not get off at Kansas City and went on had paid considerably more, because the next stop was several hundred miles further along the route.

Mr. Dyer: Q. Had you seen the flight manifest?

A. No, I did not see the flight manifest, but I

(Testimony of Harold Stanley Messersmith.)

am aware that the C.A.B. does not permit the air carriers to allow people to ride on those revenue flights free.

Q. Have you ever investigated the records of TWA to determine precisely how much money was paid by all those passengers for that flight?

A. No, sir, I did not, but I have investigated the records of all of the air carriers as issued by the Civil Aeronautics [243] Board, and we find that, predicated on the average load factor, that the airlines' total revenue from passenger service at San Francisco Airport, dealing——

Mr. Dyer: Just a moment, if the Court please; I submit that his answer thus far is not responsive and is volunteered. I simply asked if he had investigated the records of this one airline as to the revenue received from that particular flight. I don't believe that that calls for a general statement as to the overall revenues of all airlines.

Mr. Thomson: I don't think you can tell whether he is answering the question until he completes his answer.

Mr. Dyer: I think you can tell at this time.

The Court: I will merely have the reporter read the question and the answer as far as given.

(The reporter read as directed.)

The Witness: (Continuing) In passenger service only, because it is nearly \$250,000 per day.

Mr. Dyer: I move that all of that answer with the exception of the word "no" go out, sir, as not responsive.

(Testimony of Harold Stanley Messersmith.)

The Court: The objection will be overruled. The question and answer may stand.

Mr. Dyer: Q. Do you have any information of your own knowledge concerning the amount of express that was loaded on that plane?

A. I do not have any personal knowledge of that fact. [244] However, I answered it by stating approximately or in excess of the amount, because I purposely made the figure very low so that it would be less than you would normally realize from a full revenue load.

Q. You did not see the number of express shipments that were loaded on that plane, did you, Mr. Messersmith?

The Court: The answer is he doesn't know.

Mr. Dyer: He doesn't know. All right, sir.

Mr. Dyer: Q. I think that you also referred to the amount of mail carried on that flight?

A. I did not refer to the amount of mail: I referred to the fact that mail was carried.

Q. Mail was carried. Do you have any knowledge, of your own knowledge, how much mail was carried? A. No, I do not have.

Q. Do you have any knowledge of the expenses of TWA that were allocated to that flight, overall expenses, of your own knowledge?

A. No, but I have seen reports issued by TWA as to their financial status and as to the amount of profit that they are making.

Q. That is overall, but my question was an allo-

(Testimony of Harold Stanley Messersmith.)

cation of expenses to that particular flight, such as out-of-pocket expenses.

A. The answer to that is no. However, we do know that the [244] revenue load factor or the revenue derived per flight out of San Francisco Airport is far higher than the average revenue that TWA realizes from other Airports on its route. In many instances it is hundreds of per cent higher.

Mr. Dyer: I move to strike that entire answer with the exception of the first word "no".

The Court: It may go out.

Mr. Dyer: Q. Mr. Messersmith, as I understood your testimony on that point, it was that TWA, on the basis of your assumptions and your derived figure, obtained a certain amount of revenue from one of several customers of the Airport; that is correct, is it not? A. That is correct.

Q. Do you relieve that a rate of any Utility should be based upon the amount of revenue that a customer of that Utility might obtain from the utilization of the service?

A. No, I do not believe that that is necessarily the barometer upon which they should pay. Our schedule of rates and charges now in effect are not predicated on that basis unless an air carrier by preference requests that they be placed on that basis. Now we have what is called an alternative schedule. That has been chosen by request by one air carrier. In that instance the carrier accepted the application of a 3.2 per cent penetration into its gross receipts for passenger revenue at the San

(Testimony of Harold Stanley Messersmith.)

San Francisco Airport. That was not mandatory [245] in our rate and charge schedule but provided an alternate by which short haul carriers who have a repetition of landings at close intervals may accept that method of payment. I might add that on that basis they are paying more today than the schedule of rates and charges provides for.

Q. Mr. Messersmith, let me put it to you this way: A customer of the Telephone Company utilizes certain telephone services, and because he is able to place certain telephone calls he obtains certain profits. Do you believe that the charges of the Telephone Company to that man for the use of that service should be based upon the profit that that man makes?

A. No, and in our rate and charge structure we have not pursued that method. We have pursued the method of trying to determine or determining the cost of perpetuating the Airport and by perpetuating certain segments of the Airport and then dividing the cost among the users. In the case of the scheduled air carriers the rate and charge structure now in existence is predicated on the utilization of our common use facilities to 80 per cent of its potential. In actual effect we are down around 30 to 40 per cent, so that even if we derive all of the revenue on the schedule—on the basis of our present schedule of rates and charges, we will only realize less than half of the revenue necessary to perpetuate the common use facilities based on today's volume of traffic.

(Testimony of Harold Stanley Messersmith.)

Q. Mr. Messersmith, I take then that your answer is that you [246] don't believe the charges to a customer should be based upon the profit or revenue that a customer may receive through a partial utilization of the service provided, is that correct?

A. No. But that may point out the reason that we have mentioned these proportions,—that is the payment by TWA as opposed to the revenue,—is that Mr. Thompson in his testimony indicated that this was going to do great economic harm or damage to TWA; and relatively the charges are insignificant as compared with the total revenue.

Mr. Dyer: I will move that that latter statement go out as irrelevant and the opinion and conclusion of the witness.

The Court: The question and answer may stand. The objection will be overruled.

Mr. Dyer: Q. Mr. Messersmith, I wish to discuss with you briefly the letter that was received in evidence at the instance of the City and is marked Defendants' Exhibit E. It is a letter to Mr. B. M. Doolin, dated May 17, 1946, and signed by A. M. Jens, Jr., of TWA. Mr. Jens at that time was a member of the Air Transport Association of America, was he not, sir?

A. I never heard that he was secretary of the Air Transport Association. This is signed J. M. Jens, Jr., Secretary, Transcontinental and Western Air.

Q. That is right; but I have some question

(Testimony of Harold Stanley Messersmith.)

whether that is responsive. Isn't it a fact at that time he was a member of the Air Transport Association? [247] A. I would not know.

Q. Would you read the second paragraph of that letter to refresh your recollection?

A. (Reading) "The investment necessary to provide a second runway system is considerable and, unless full value can be achieved from the use of the field, does not seem to be justified. After considerable investigation the Air Transport Association of America has decided upon a recommended spacing for such runways of 1,500 feet from centerline to centerline in order to permit simultaneous operations under other conditions than contact. We subscribe to this recommendation and believe that anything less will not achieve fully the desired objective."

Q. Isn't it a fact, Mr. Messersmith, that he was there speaking of a recommendation of Air Transport Association of America?

A. It would appear to me, if you are asking that question, that it was both the Air Transport Association and TWA's recommendation. TWA is a member of the Air Transportation and participates in the existence of that group.

Q. He is speaking here specifically, however, of the recommendation of the Association: isn't that so?

A. I would anticipate that if it was from the Airport [248] Transport Association, it would have been on their stationery and not on TWA station-

(Testimony of Harold Stanley Messersmith.)

ery. We have other correspondence from the Air Transport Association that does not come on air carrier stationery.

Q. Well, I don't wish to prolong this unduly, Mr. Messersmith, but isn't it a fact that the letter speaks of the recommendation of the Air Transport Association?

The Court: The letter will have to speak for itself in any event.

Mr. Dyer: Very well, sir.

Mr. Dyer: Q. Isn't it a fact that from time to time the Airport has asked the advice of various airline and Airport Associations such as the Air Transport Association?

A. It is a fact that we confer with representatives of the scheduled air carriers regularly using our facilities from time to time in the planning of our Airport development.

Q. And you ask them for advice and recommendations; is that correct?

A. Yes, we do ask them for advice, recommendations and various data.

Mr. Dyer: That is all for Mr. Messersmith on cross examination. [249]

Redirect Examination

Mr. Thomson: Q. Mr. Messersmith, in the calculation of the revenue from this flight from San Francisco to Kansas City, which is becoming quite famous, did you calculate in the figure which you furnished to his Honor any revenue from mail?

(Testimony of Harold Stanley Messersmith.)

A. I made my statement at that time that that would be the approximate passenger revenue, and in addition that they would derive revenue, I believe, from airmail and other cargo.

Q. Your figure, however, did not comprehend revenue from mail, am I correct?

A. It did not.

Q. Likewise, is the same thing true of the revenue which might have been derived from express? Was that calculated in your figure?

A. It was not.

Q. Does the Railway Express business of the Airport—Rather, does the express business being operated at the Airport embody any operation of aircraft by the express company?

A. No, it does not.

Q. Just what is the activity of the express company in that connection?

A. They primarily serve the scheduled airlines, at the Airport. They use—they collect and disseminate express. That is, they collect express that is being shipped by these various schedule air carriers, and when express is brought to [250] the Airport by the air carriers they distribute that express.

Q. Are you familiar with the figures embodied in the document of October 1942, with respect to common use facilities to be used by TWA?

A. Yes, I am.

Q. Have you compared those figures with the rates and charges then in effect?

A. Yes, I have made a comparison of the sched-

(Testimony of Harold Stanley Messersmith.)

ule of rates and charges then in effect with those included in the 1942 leasing agreement with TWA.

Q. What is the result of your comparison?

Mr. Dyer: I will object to that as incompetent, irrelevant and immaterial; it isn't the best evidence. The lease is either valid or isn't, your Honor, and I don't see how inquiry of this nature could aid the Court in determining that question.

Mr. Thomson: It is my purpose to establish that the figures set forth in the October 1942 document are in precise accord with the rates and charges then in effect, and from that this Court could reasonably draw a conclusion to the proper construction of the document so that those rates and charges apply, subject to further revision of rates and charges. That is the purpose of this testimony, your Honor.

Mr. Dyer: Your Honor, if the lease is a valid document and that was the bargain of the City at the time, then I [251] believe that we are obligated to pay those rates and charges or those rentals and no others.

On the other hand, if the Court decides that the position of the City is correct, then we pay such level of rates and charges as may be determined by the Public Utilities Commission of the City.

Those are questions of ultimate fact, and I believe that any evidence of the details underlying those facts by which the City may arrive at some level of rates and charges to be determined by the Public Utilities Commission of the City in the event

(Testimony of Harold Stanley Messersmith.)

of a decision adverse to the plaintiff's position is not pertinent evidence.

The Court: It may or may not become material. I will allow it subject to your motion to strike and over your objection.

Mr. Thomson: Q. What is your conclusion after making that comparison, Mr. Messersmith?

A. The schedule of rates and charges concerning common use facilities or landing charges is the same in the schedule of rates and charges adopted by the Commission and the lease agreement.

Q. In other words, there is complete accord in those figures? A. Yes, there is.

Q. There has been mentioned in the testimony throughout taxi-ways and runways and aprons and paved areas. Will you, [252] for the information of the Court give an estimate as of today as to the length and extent of those paved areas, inclusive of the runways and aprons?

A. Well, the total paved area that is considered common use facility would be equivalent to approximately 60 miles of four-lane highway such as the Bayshore Freeway. That is, the equivalent amount of paving as to common use facilities.

Q. Well, you say "equivalent amount of paving". Do you mean from the standpoint of distance?

A. Well, you could compare the runways, taxi-ways and apron areas that are used for common use purposes by scheduled airline carriers and others to a four-lane highway 60 miles in length.

Q. That is all on the airport, though?

(Testimony of Harold Stanley Messersmith.)

A. Yes, that is all on what we call the common use facilities.

Q. I have here Plaintiff's Exhibit 1, which sets forth various operations of the airport by TWA under the category of various planes, and noting the runways item, November of 1952 to December 31st, 1952, there appears from this exhibit that there is one DC-4, one DC-3 and seven Constellations. As of today is that about representative of the proportion between those different types of planes?

A. It is approximately representative. I believe that the number of Constellations flights have increased.

Q. Do the Constellations operated as of today by TWA vary [253] as to weight?

A. Well, as I recall the initial Constellation plane put in service by TWA in approximately 1947 weighed 77,800 pounds. I believe the present Constellation's maximum gross weight has come up as high as 120,000 pounds.

Q. Is there more than a 120,000 pound Constellation in operation today by TWA?

A. Yes. That is the maximum weight of the aircraft that I know they are operating today. However, I understand that they contemplate the operation of a larger Lockheed Constellation.

Q. Have you heard about that new design in Constellation?

(Testimony of Harold Stanley Messersmith.)

A. Well, I believe it is a Lockheed 1049-C, and will have a maximum weight of 130,000 pounds.

Mr. Thomson: Inasmuch as I might require Mr. Messersmith to testify on this subject, may I again present to you what I discussed with you when his Honor came on the bench?

Mr. Dyer: Yes.

Mr. Thomson: I would appreciate a stipulation that the property referred to in this letter is the same area that was involved in your questions to Mr. Messersmith yesterday. I can prove it, but there is no need of encumbering the record unnecessarily.

Mr. Dyer: I will stipulate that that is the area in front of Hangar No. 4, which was adverted to by me yesterday. [254]

Mr. Thomson: Yes. And you made particular reference to the right of ingress and egress, and also the right of others, other aircraft companies, to traverse the area.

Mr. Dyer: I think that in discussing that area that was the purport of the questions.

Mr. Thomson: I can offer this in evidence or read it into the record, whichever your Honor prefers.

The Court: You might read it into the record.

Mr. Thomson: This is a letter addressed to myself as Public Utilities Commission counsel under date of December 3, 1952:

(Testimony of Harold Stanley Messersmith.)

“Mr. A. Dal Thomson 1 December 1952
Public Utilities Counsel
Office of the City Attorney, City Hall
San Francisco 2, California.

Re: Use of Space Adjoining Hangar No. 4 and
to the East Thereof—San Francisco Inter-
national Airport.

“Dear Mr. Thomson:

“Referring to your letter of 11 September 1952 to
Lew Goss requesting that TWA pay for the space
hereinafter referred to at the rate of \$0.75 per
square feet per annum in connection with TWA’s
maintenance of aircraft thereon:

“Beginning with the month of January this con-
firms that for such time as TWA does maintenance
work [255] on aircraft on the space outlined in yel-
low on the drawing attached hereto (and to tripli-
cate copies hereof) TWA will accept and pay
monthly billings from the City and County of San
Francisco for such use of said space at the rate of
\$2,137.50 per annum. As shown on the attached
drawing of your Utilities Engineering Bureau (No.
BA-10567) this area comprises 28,500 square feet.

“As we have agreed, this arrangement shall in
no wise be construed as having any effect upon our
respective rights or obligations under any existing
permits or contracts or litigation in regard thereto.
Receipt and payment by us of initial billing for the
month of January 1953 will constitute sufficient ac-

(Testimony of Harold Stanley Messersmith.)

knowledge of our understanding in this regard.

“Very sincerely yours,

“Trans World Airlines, Inc.

“By A. R. Thompson, Jr.

“General Manager of Properties.

“P.S.: For convenience, I herewith return the permit forms transmitted by your letter of 21 November 1952 from which I have detached the referred to drawing, attaching copies of same to original and triplicate copies of this letter.

A.R.T., Jr. [256]

“CC: L. W. Goss—ART/LB—Attach.”

Mr. Thomson: Q. Now, Mr. Messersmith, what does that figure of \$2,137.50 per annum represent?

A. Well, that represents the payment of charges for the area that was—that TWA was entitled to use for ingress and egress. However, they were utilizing it for the maintenance and overhauling and servicing of aircraft. Consequently, that was brought to their attention, also the damage that had been sustained over a period of time, and it resulted in that payment.

I might advise, too, that in that letter the first figure stated, 75 cents per square foot, per annum, should be seven and one-half cents per square foot per annum.

Q. In any event, it was resolved in the figure of \$2,137.50? A. It was, that is correct.

(Testimony of Harold Stanley Messersmith.)

Q. What does that figure represent, Mr. Messersmith?

A. It represents an area of approximately 28,000 square feet that is used exclusively by TWA.

Q. Does it have any relevancy to the regular schedule of rates and charges?

A. It is in accord with the existing schedule of rates and charges.

Q. Mr. Messersmith, in 1942 and throughout the year of 1942 [257] how many scheduled air carriers were there in the whole United States?

A. Well, according to the Civil Aeronautics Administration Statistical Handbook of Civil Aviation, there were 19 Federally certified scheduled aircraft operators in the United States.

Q. How many under that heading—

The Court: Just a moment. Break that down further so I may have a better understanding of it.

The Witness: There were 19 different corporations engaged in scheduled air carrier operations, that is, passenger or passenger and mail or passenger, mail and express activities throughout the entire United States.

The Court: What date is that?

The Witness: That is—that was as of 1942.

Mr. Thomson: Q. Does that comprise the full year of 1942? A. Yes, it does.

Q. I don't know whether his Honor understands the significance of the words "scheduled air carriers." I know for a long time I didn't understand

(Testimony of Harold Stanley Messersmith.)

it. Will you explain the significance of the words "scheduled air carriers"?

A. Well, the scheduled air carrier in this instance is one that has a Federal Certificate of Competency to operate on a given route in the United States. That is issued by the Civil Aeronautics Board. [258]

The Court: You could schedule a train in the same way.

Mr. Thomson: Yes, your Honor.

Mr. Thomson: Q. There are, however, some outfits that are called non-scheduled?

A. Yes. I do not have any knowledge of any real operations of any unscheduled or irregular air carrier at that time.

Mr. Thomson: I think we would have to go to Oakland for that information, wouldn't we?

Mr. Thomson: Q. Now, these total scheduled air carriers of 19, and still referring to the whole year of 1942, how many planes were in operation by those scheduled air carriers?

A. The aircraft in service by the 19 scheduled air carriers amounted to a total of 186 aircraft throughout the United States.

The Court: What is it today, if you have it there available?

The Witness: I do not have today's figure, but I have 1948 at which time it was 878. It has grown substantially since that 1948 report, however.

Mr. Thomson: Q. Still referring to the year

(Testimony of Harold Stanley Messersmith.)

1942, how many of these 28 scheduled aircraft operated planes weighing more than 25,500 pounds?

A. This particular report does not show 1942. However, in December of 1943 it indicates that there were no aircraft operated by the scheduled aircraft domestically in the United [259] States of weights exceeding 25,500 pounds.

Q. When was aircraft exceeding 25,500 pounds first placed in service by any scheduled aircraft carrier in the United States?

Mr. Dyer: Your Honor, in line with my previous objection may the record show I object to this question and to this line of questioning on the ground that it is incompetent, irrelevant and immaterial?

The Court: Let the record so show. Objection will be overruled. I have given you the widest latitude for a number of days and he is trying to catch up with you.

A. This report of the Civil Aeronautics Administration shows that in December of 1945 there were five four-engine aircraft in operation by the scheduled air carriers in the entire United States.

Mr. Thomson: Q. I wasn't directing my question, Mr. Messersmith, to the element of four-engined aircraft. I was directing my question to the element of 25,500 pounds.

Now, how many planes were in service by any scheduled aircraft carrier in the United States in excess, at that time, of 25,500 pounds?

A. Oh, on December 31st, 1945, there were five.

(Testimony of Harold Stanley Messersmith.)

Q. Were there any more than five?

A. No, the report of the Civil Aeronautics Administration indicates a total of five. [260]

Q. By that date of December 31st, 1945, that you have just referred to, how many aircraft were there in operation by scheduled airlines which were less than 25,500 pounds? A. 416.

Q. When did the Lockheed Constellation first go into service at any place in the United States by a scheduled aircraft carrier?

A. The report of the Civil Aeronautics Administration shows that there were 16 Lockheed Constellation L-49's in service June 30th, 1946.

Q. Is that the first record of service by any Constellation?

A. That is the first record of service by a Lockheed Constellation.

Q. How many four-engined planes were in operation by any scheduled airline in December 1946?

A. The report of the Civil Aeronautics Administration indicates that on December 31st, 1946 there were a total of 17 four-engined airplanes operated by the scheduled air carriers throughout the United States.

Q. Then it wasn't until 1946, was it, Mr. Messersmith, that there were any experience or appreciable knowledge on the cost of maintenance or cost of operation of aircraft of the type of the four-engined aircraft, is that correct?

Mr. Dyer: I will object to that on the ground it is incompetent, irrelevant and immaterial. The cost

(Testimony of Harold Stanley Messersmith.)

of maintenance [261] of aircraft, the subject adverted to by Mr. Thomson, has no bearing on the issues in this case.

Mr. Thomson: Well, I think the question probably could be more successfully objected to on the ground it is leading, and I will withdraw it.

Mr. Thomson: Q. Mr. Messersmith, when did you first begin to acquire any knowledge as to whether or not planes of the Constellation type were coming into general use?

A. To the best of my recollection it was in 1943.

Mr. Thomson: You may take the witness.

Recross Examination

Mr. Dyer: Q. Mr. Messersmith, in response to Mr. Thomson's questions on redirect examination you referred to the Railway Express Agency and said that charges to that Agency were not charges to the airlines.

Well, now, isn't it a fact that in your schedule of rates and charges certain services are noted therein for which charges are not made to airline companies? A. I would prefer——

Mr. Thomson: Just a moment. Pardon me, Mr. Messersmith. Mr. Dyer, is your question directed to the San Francisco Airport?

Mr. Dyer: I am referring to the 1951 schedule of rates and charges of the San Francisco Airport.

Mr. Thomson: Well, wouldn't that schedule speak for itself?

Mr. Dyer: Well, I am asking him if he knows:

(Testimony of Harold Stanley Messersmith.)

The Court: Do you know? Do you understand the question?

The Witness: I do not understand the question. It is general, refers to air express rates and charges in general.

Mr. Dyer: Q. As I understood your answer to Mr. Thomson's question, it was that the Airport makes certain charges to the Railway Express Agency for the use of certain space at the Airport which it utilizes in the handling of air express, and his question, as I take it and as I recall it, is that that charge was not made to an airline company.

A. We do not bill the air express company for any utilization of the airport. The air carriers are the ones that bill the air express company for the use of airport facilities.

Q. Isn't it a fact that under your schedule of rates and charges—and I am now referring to the rates and charges at the San Francisco Airport—that there are charges therein to be made to petroleum companies for the use of wharves?

A. Yes, there is a portion of our schedule of rates and charges applicable to that phase of operations.

Q. And that, of course, is not a charge applicable directly to an air line, is it?

A. It is not a charge directly to anyone that does not use the facility. [263]

Q. Now, also isn't it a fact that you also have charges for the use of pipe lines at the Airport?

A. That is correct. That would be applicable

(Testimony of Harold Stanley Messersmith.)

either to petroleum companies, airlines, or others who may acquire those facilities.

Q. That is correct. And that may be applicable under your schedule of rates and charges to aviation companies and to other types of companies?

A. That's right. On the same terms and conditions.

Q. Yes. Now, Mr. Thomson put some questions to you, and as I understood his questions he referred to a comparison of rates under the present schedule and those under the schedule of 1942. Was there any schedule of rates and charges in 1942?

A. Yes, there was.

Q. When was the first schedule of rates and charges promulgated by the Public Utilities Commission of the City?

A. I do not have that information with me. It could be supplied by the Public Utilities Commission.

Q. Isn't it a fact the first schedule was promulgated effective September 1st, 1946?

A. No, that is not a fact.

Q. That is not a fact? Do you have any recollection at this time of when the first schedule was promulgated?

A. I would prefer to refer to the record at the Public Utilities Commission for that information. However, I can give [264] you the date that the schedule of rates and charges that was adopted prior to the consummation of the TWA lease was adopted.

Q. I see. Now, I notice that you have read from

(Testimony of Harold Stanley Messersmith.)

a document in your hand concerning a number of four-engined planes in commercial service generally during the years 1945, 1944 and 1946, as I recall. Now, isn't it a fact, Mr. Messersmith, that most of the four-engined planes in the United States were utilized by the Military during those very critical war years?

A. That is correct. The four-engined airplanes of the size of the Lockheed Constellation did not come into use until possibly 1943 or 1944.

Q. And isn't it a fact that the Lockheed Constellations were made available to the Military—

A. That's right.

Q. —in 1943 and 1944?

A. Their development was greatly accelerated because of the requirements for that type of aircraft for war use.

Q. And I take it that that document from which you read would not have statistics concerning the number of four-engined transport planes which were utilized by the Military or which had been taken over by the Military from aviation companies during the war?

A. That is correct. However, by December 31st, 1946, they had returned some of the aircraft, and at that time there was a total of 17 four-engined aircraft operating by all of the domestic air carriers in the United States.

Q. The possibility, or in fact the probability of four-engined aircraft coming into commercial use was well known at that time, isn't that so?

(Testimony of Harold Stanley Messersmith.)

A. Yes. That is why we were going before the electorate in an effort to acquire funds for the development of an airport that would provide facilities from which TWA and others could operate safely.

Mr. Dyer: That is all.

Mr. Thomson: Just a moment, Mr. Messersmith. I overlooked a question or two that I should have asked on redirect examination. If I may have the privilege of reopening the redirect examination?

The Court: You may.

Further Redirect Examination

Mr. Thomson: Q. Mr. Messersmith, have you prepared a chart with reference to comparison of charges at airports other than San Francisco, and including charges at San Francisco?

A. Yes, I have. It was done under my direction.

Q. I show you this. Is this the chart that you had prepared under your direction?

A. Yes. Those are comparative charges for other airports [266] and various types of aircraft, predicated on the schedule of rates and charges provided by the various airports included in the report.

Mr. Thomson: I will offer this in evidence, if your Honor please.

Mr. Dyer: I will object to it, if your Honor please, on the ground that it is improper redirect evidence. I don't recall that this subject was adverted to on cross examination.

The Court: Well, counsel, probably you didn't

(Testimony of Harold Stanley Messersmith.)

follow me. He indicated he overlooked it and the Court gave permission.

Mr. Dyer: Further object to it on the ground that it is incompetent, irrelevant and immaterial.

Mr. Thomson: Of course this subject was somewhat extensively gone into by counsel for the plaintiff in inquiry as to practices and charges at other airports. He went at great length into the practice of Los Angeles.

Mr. Dyer: May I call your Honor's attention to the fact that that subject was not adverted to by counsel for the plaintiff. I went into the subject of what type of arrangement, whether contract, lease or public utility relationship was used as to the various airports. I believe the record will sustain my statement that at no place did I advert to charges at the various airports throughout the country. As a matter of fact, I have consistently objected to evidence of that nature. [267]

The Court: You might identify this for the Court. What is it?

Mr. Thomson: This is a tabulation of— Perhaps it would be easier if I just handed it to your Honor. (Handing document to the Court). It is a tabulation of charges at various airports throughout the country.

The Court: Matter submitted?

Mr. Dyer: Yes, sir.

The Court: Objection will be overruled.

(Testimony of Harold Stanley Messersmith.)

(Thereupon tabulation of charges referred to above was admitted into evidence and marked Defendants' Exhibit F.)

Mr. Thomson: Q. Mr. Messersmith, did you take occasion in the course of your duties shortly prior to March 18, 1953, to submit to various airlines a schedule of rates and charges studies, and concession arrangements?

A. Yes, that was submitted through the office of the manager of Utilities.

Q. And was this submitted to TWA in addition to the various other airlines?

A. Pardon me, I would like to see the document to make certain.

The Court: We will take a recess so that counsel can show the witness that document.

(Short recess.) [268]

Mr. Thomson: Q. Mr. Messersmith, in the year 1951, in March or prior to March, 1951, did you have occasion to prepare any document for submission to the airlines? A. Yes.

Q. I will hand you this. Is that the document?

A. Yes, this is the document.

Q. That is headed "Interim Rate & Charge Report, San Francisco Airport, March, 1951." What in substance did this document consist of?

A. Well, in substance, it consisted of an explanation as to the justification for the 1951 schedule of rates and charges.

Q. Was this document transmitted to TWA among other airlines? A. Yes.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: We will offer it in evidence, if your Honor please.

Mr. Dyer: I will object to it, if your Honor please. As far as we are concerned, it is hearsay. It also, from my brief examination of it,—I have just been handed a copy—contains opinions and conclusions, and further it is self-serving, and I don't believe that it is proper redirect evidence, and I believe it is wholly irrelevant, incompetent and immaterial.

Mr. Thomson: It isn't hearsay, your Honor. in any sense, for the reason that it was submitted to TWA. Let me ask one more question:

Was there any comment from TWA on this document? [269]

A. I do not recall receiving any comment.

Mr. Dyer: I have the further objection, if your Honor please, that the schedule of rates and charges as alleged in the answer and cross-complaint may have some bearing on the issues of this case, but the underlying document and the arguments of the City in support of those rates and charges certainly shouldn't have any bearing on the issues in this case. The ultimate fact is:

What are the schedule of rates and charges?

Mr. Thomson: If the Court please. I don't think counsel is entitled to assume in his own favor a decision of the Court which would uphold the plaintiff's position in this case.

The very question, of course, is whether or not the schedule of rates and charges is applicable or

(Testimony of Harold Stanley Messersmith.)

whether the so-called frozen charges are applicable, and if your Honor should arrive at a decision favorable to the City, the contents of this document would serve to some extent to sustain your Honor as to the rates and charges to be applied.

Mr. Dyer: If your Honor please, I do not believe that the reasonableness or unreasonableness of a charge is in issue before this Court. The reasonableness or unreasonableness of a Public Utility rate, if such these charges are, is a matter solely for the determination of an administrative body. The cases, I believe, are uniform that the question of reasonableness or unreasonableness of a Public Utility rate is essentially [270] a matter for legislative inquiry through a Public Utilities Commission. This Court has only to determine whether the schedule of rates and charges applies or whether the rentals apply.

I do not believe that it is pertinent or that this Court has any jurisdiction to determine the reasonableness or unreasonableness of the rates. There are many decisions on that point, if your Honor please.

Mr. Thomson: A further ground upon which your Honor could well admit this document is that it is an official document, established by the witness to have been such, prepared in the usual course of his duties. I think the rule as to official documents is not limited to documents which might be adverse to the City.

I offer it also upon that theory.

Mr. Dyer: I think the main objection is, sir, that

(Testimony of Harold Stanley Messersmith.)

this document is not pertinent to the issues in this case, and it concerns essentially the reasonableness or unreasonableness of a rate of a Public Utilities Commission which sits in the State Building and of the City which sits in the City Hall that will consider these matters and not any judicial body of the Federal Government.

Mr. Thomson: If your Honor please, in an endeavor to shorten proceedings and in my desire not to lead the Court into any error, I will withdraw the offer at this time. [271]

The Court: It may be admitted for the purpose of identification.

Mr. Thomson: Very well.

The Court: It may assist me. I do not know fully the problems that I may meet here. You gentlemen are closer to your case, to your theory of the case. I think it might be helpful if it goes in subject to a motion to strike over your objection. It may assist the Court.

Mr. Thomson: I will withdraw my——

The Court: I am not prepared to say, so that you have an opportunity and counsel have an opportunity. I will strike it if I determine that it won't reach any of the issues of this case or whether or not it is admissible.

Mr. Dyer: I think I have stated my reasons clearly to your Honor, and at the appropriate time then I will make a motion to strike.

The Court: Very well.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Will it be marked as an exhibit now subject to a motion to strike?

The Court: It may go in.

The Clerk: Defendants' Exhibit G admitted and filed into evidence.

(Whereupon report referred to above was marked Defendants' Exhibit G and admitted into evidence.)

Mr. Thomson: Q. Counsel mentioned in his questioning [272] to you about the wharfage charge on the gasoline supplied. Will you enlighten us as to how gasoline first comes to the Airport?

A. The Public Utilities Commission in developing seaplane harbor facilities also made available a waterway by which the scheduled air carriers and others can effect deliveries of gasoline to the Airport via barge delivery. This development cost the City \$500,000.

The air carriers and the petroleum companies by availing themselves of the use of the waterway provided by the city are able to save approximately one-quarter of a cent per gallon of gasoline. Their consumption for the deliveries at the present time amount to approximately 30,000,000 gallons per year. We derive a wharfage fee that amounts to 25 cents per 42 gallon—25 cents per 52 gallon barrel. That means that we derive approximately \$20,000 per year for the use of these wharves and other facilities provided by the City.

Mr. Dyer: If your Honor please, I move to strike that answer upon the ground that it is not respon-

(Testimony of Harold Stanley Messersmith.)

sive and it is a volunteered statement. The question did not call for the cost to the City with reference to wharfage charges to gasoline companies.

The Court: I will allow the question and answer to stand.

Mr. Thomson: Q. Mr. Messersmith, I have a memorandum here which indicates that the actual charges are two and one-half [273] cents per 42 gallons.

A. That is correct. I believe I stated 25; two and a half cents per barrel is correct.

Mr. Thomson: You may take the witness.

Recross Examination

Mr. Dyer: Q. Mr. Messersmith, do you have before you a copy of the exhibit entitled "Operational Charges per Average Take-off and Landing"?

A. Yes, I have.

Mr. Dyer: If the Court please, I take it that this cross-examination is without prejudice to my motion which I have made to strike this document?

The Court: Let the record so show.

Mr. Dyer: Q. Mr. Messersmith, I notice that you list here San Diego Airport, Lindbergh Field. Does TWA operate at that point?

A. Yes, I believe they do.

Q. Do you know that of your own knowledge?

A. No, I do not. I have not landed there on a TWA airplane.

Q. Does TWA operate at the Sacramento Municipal Airport, which is the next point noted?

(Testimony of Harold Stanley Messersmith.)

A. No, they do not.

Q. Do they operate at Bradley Field, Connecticut?

A. No; I believe they operate at some of the airports, [274] possibly London and Paris I have mentioned, and Shannon.

Q. I am asking you specifically now for your knowledge of the operations of TWA at Bradley Field, Connecticut, which is shown on this exhibit. Do you have knowledge of TWA's operations there?

A. No, I do not.

Q. Memphis Municipal Airport is the next airport noted on this exhibit. Does TWA operate at that point?

A. I notice that you missed some at the top.

Q. Please answer my question now, Mr. Messersmith. A. Memphis, I do not know.

Mr. Dyer: Counsel is very competent to elicit such information as he desires.

A. I do not know.

Mr. Dyer: Q. Does TWA operate at the Memphis Municipal Airport?

A. I do not know that.

Q. You made no investigation of that fact?

A. No.

Q. Before you discover this exhibit. You next have noted Kern County. Is that the Kern County Airport near Bakersfield? A. Yes, it is.

Q. Does TWA operate at that point?

A. Not regularly, although they have gone into Bakersfield.

(Testimony of Harold Stanley Messersmith.)

Q. They have no regular schedule at that point, is that [275] correct?

A. That is correct.

Q. Your next point noted is Springfield, Missouri Airport. Does TWA operate there?

A. No, they do not.

Q. Will you tell me whether they operate at El Paso International Airport, which is also listed hereon?

A. I believe they do. I believe that was owned by them at one time; I am not certain of that.

Q. You are not certain of that? A. No.

Q. Did you make any investigation of that fact before you constructed this exhibit?

A. No; this exhibit was not prepared specifically for this purpose. This was operational charges from airports. We sent requests for such data to approximately 43 airports, and this happens to be a list of the airports that complied with our request for a copy of their schedule of rates and charges.

Q. How about Seattle-Tacoma Airport, does TWA operate at that point?

A. They do not.

Q. And again, do they operate at Oklahoma City or Will Rogers Airport which is noted hereon?

A. I couldn't answer that.

Q. You haven't any knowledge of that? [276]

A. No.

Q. Do they operate at the Love Field, Dallas?

A. I don't know whether they do or do not. I don't think they do regularly.

(Testimony of Harold Stanley Messersmith.)

Q. Do they operate at the Portland International Airport? A. No.

Q. Do they operate at Birmingham, Alabama?

A. You missed one; pardon me. Birmingham—I don't know that they operate there.

Q. Does TWA have operation in Stockton Airport which is noted hereon?

A. No regular operation.

Q. Do they have any operation there?

A. None to my knowledge.

Q. How about Minneapolis-St. Paul Airport? Do they operate there? A. No.

Q. They operate at Shannon, London and Paris?

A. That is right.

Q. The next one. Do they operate at San Juan, Cuba? A. No.

Q. Do they operate at Montreal?

A. You missed Gander.

Q. They do at Gander. Do they operate at Montreal? A. No, not to my knowledge. [277]

Q. Do they operate at Honolulu? A. No.

The Court: I will entertain a motion to strike this document.

Mr. Dyer: I move——

Mr. Thomson: I so move, your Honor, upon the ground that it is on an entirely irrelevant subject. The exhibit, as testified by the witness, was not prepared for the purposes of this case.

The Court: To stop this line of testimony, it may be stricken from the record.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Thank you, sir. That is all of the recross-examination.

Further Redirect Examination

Mr. Thomson: Q. I think, Mr. Messersmith, you might read to His Honor the rate for Shannon, which is quite interesting.

Mr. Dyer: I will object——

The Court: That will be interesting, because that is the one ride I ever had.

Mr. Dyer: They have a fine restaurant there.

Mr. Thomson: It is a credit to the Irish, yes.

A. The charge for a Lockheed Constellation at Shannon Airport runs from \$68.60 to \$71.70 per take-off. [278]

Q. What is the rate at Gander?

Mr. Dyer: Just a moment. I will object to that.

The Court: Having gone over this route, I am going to allow the testimony. I don't think it will prejudice you.

A. At Gander it ranges from \$130.00 to \$151.25.

Mr. Thomson: Q. For what?

A. For a take-off and landing.

Mr. Thomson: That is all.

Further Recross Examination

Mr. Dyer: Q. Do you know of your own knowledge whether TWA pays those rates at Gander and Shannon?

A. I have no knowledge of any immunity from the regular charges.

(Testimony of Harold Stanley Messersmith.)

Q. Please answer the question, Mr. Messersmith: Do you know of your own knowledge that TWA pays the rates noted hereon at Gander and Shannon?

A. No, this is predicated on the rate and charge data provided by the Airport authorities.

Q. You don't know whether those rates are applicable to any one specific airline?

A. They are listed as their schedule of rates and charges.

The Court: In any event, they have no application here? A. No.

Mr. Dyer: That is all, sir. [279]

Mr. Thomson: That is all, Mr. Messersmith.
(Witness excused.)

GEORGE D. BURR

called as a witness on behalf of the defendants and cross-plaintiffs, sworn.

The Court: Q. Your full name, please?

A. George Danforth Burr.

Q. Where do you reside Mr. Burr?

A. 144 Aptos Avenue, San Francisco.

Q. And your business or occupation?

A. Civil engineer.

The Court: Proceed, counsel.

Direct Examination

Mr. Thomson: Q. Mr. Burr, are you in the service of the City and County of San Francisco?

A. Yes. [280]

Q. And what was your capacity?

(Testimony of George D. Burr.)

A. I am in charge of the design for the Utilities Engineering Bureau, part of the Public Utilities Commission.

Q. And have you done any particular line of work for the City in engineering during the past few years?

A. Yes. Among other duties, design of the San Francisco Airport.

Q. When did you first come into the City employment? A. June, 1926.

Q. And when did you first indulge in the duties concerning the Airport?

A. I believe it was about August, 1926, before the Airport was established.

Q. At that time there was really no Airport at all?

A. No. The duty was to select a site and design and—design a suitable airport for the City.

Q. Did you engage in the design after the site was acquired? A. Yes.

Q. Are you a graduate of any University?

A. A graduate of the University of Washington.

Q. What was the degree which you obtained?

A. There are two degrees, one a Bachelor of Science of Civil Engineers, and subsequently a professional degree of Civil Engineer.

Q. Which degree did you obtain? [281]

A. I obtained both degrees.

Q. Oh, both of them? Yes. Are you a licensed engineer under the laws of the State of California?

(Testimony of George D. Burr.)

A. Yes, I am a licensed civil engineer and, separately, a licensed structural engineer.

Q. Will you explain how your duties varied from those of Mr. Doolin's as to planning?

A. The Utilities Engineering Bureau of the Public Utilities Commission does the engineering work for San Francisco Airport, and as part of such duties it collaborates with the manager of the Airport; and then after the overall decision has been made as to what projects are to be initiated, the details of design and construction is part of the duties of the Utility Engineering Bureau.

Q. Now, Mr. Burr, did you continuously remain in the course of your duties as an engineer for the Airport or was there some interval where you were not employed?

A. No, there was an interval when I was in the Military Service in the late war.

Q. About what year did you leave the City service temporarily?

A. On September 16, 1940, I reported for duty as Engineer and Signal Officer at the Harbor Defense of San Francisco, which was at Fort Winfield Scott in the City.

Q. To what location were you assigned temporarily?

A. Headquarters at Fort Winfield Scott in San Francisco [282]

Q. Did that take you away entirely from the Airport?

A. No, sir. I visited the Airport at that time

(Testimony of George D. Burr.)

about once a week, flying. Also conferred with Mr. Messersmith, Mr. Doolin and others.

Q. Were you an individual flyer at that time?

A. Correct. Private pilot.

Q. When did you return to your engineering duties? A. The 1st of May, 1947.

The Court: You were in in 1940, you say?

A. Yes, your Honor.

The Court: And remained until 1947?

A. Correct, your Honor.

The Court: All right.

Mr. Thomson: Q. At a period shortly prior to April 30, 1937, did you have occasion to make inquiry from the various airlines as to contemplated weights of planes?

A. Yes. Our office wrote the correspondence, made inquiry from all available sources including the airlines and the manufacturers of aircraft, others.

Q. As I understand your testimony, you wrote both to the airlines and to aircraft manufacturers.

A. That is correct. A bond issue was contemplated for the improvement of the Airport and it was desired to get information so that a suitable design could be made.

Q. There is a letter introduced into evidence by the plaintiff [283] in this case, which letter is one from Mr. Cahill addressed to the Public Utilities Commission. Who supplied the figures contained in that letter?

A. I tabulated the figures that were transmit-

(Testimony of George D. Burr.)

ted to Mr. Cahill, and he copied them from those.

Q. How were these figures compiled in the first instance?

A. They were compiled from information we gathered from these various sources aforementioned.

Mr. Thomson: (Handing document to Mr. Dyer.)

Mr. Dyer: May I have your indulgence for a moment, counsel?

Mr. Thomson: If it is all right with His Honor.

The Court: It is all right.

Mr. Thomson: Q. Is this the document you speak of in the compilation of figures, Mr. Burr?

A. It is.

Q. And is that data taken from the reports that you received from the various airlines, is that correct?

A. And also from other sources, including the manufacturers of aircraft.

Q. Yes.

A. Much of it came from the manufacturers. The data from the airlines was rather meager and much of it to the effect that, "We don't contemplate any larger or heavier planes, that we would sooner have more frequent service," and we had to draw on our conclusions primarily from what was on the drawing [284] boards or contemplated by manufacturers of aircraft.

Q. When you refer to airlines, is that inclusive of TWA?

A. I believe they were consulted. However, I did not personally do it.

(Testimony of George D. Burr.)

Mr. Thomson: I will offer this in evidence, if your Honor please.

Mr. Dyer: May the record show the date of that document, please?

Mr. Thomson: There is a stamp at the foot of the document, "Received April 3 of 1937, L. W. Stocker."

Mr. Thomson: Q. Who is Mr. Stocker?

A. He was at that time in charge of design. I was in charge of the design for the Airport as of that date.

Q. Is he now with the City and County of San Francisco?

A. No, he has since retired.

Q. Yes, but I mean at that time he was.

A. He was, yes.

Mr. Thomson: I will offer this in evidence, if your Honor please.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit H admitted and filed in evidence.

(Thereupon tabulation of figures admitted into evidence as Defendants' Exhibit H.)

Mr. Thomson: Q. Mr. Burr, did you observe anything on [285] the surface of the Airport of an unusual nature within the past few years?

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial: no foundation laid.

The Court: Objection is sustained.

(Testimony of George D. Burr.)

Mr. Thomson: Q. Mr. Burr, what year did you say you returned to the Airport?

A. 1st of May, 1947.

Q. 1947? After the 1st of May, 1947, did your duties comprehend visits to the Airport?

A. Yes.

The Court: However, during that interval, if I follow his testimony, he visited it about once a week.

Mr. Thomson: Yes, while he was at Fort Scott.

A. Not continuously, your Honor.

The Court: Was it continuous up until 1947?

A. Up until about May or June of 1945, at which time I went overseas.

Mr. Thomson: Q. What did you observe after you came back to the Airport with reference to the condition of the surface of the Airport?

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled. You may answer if you observed anything unusual. [286]

A. One of the first things that was observed was the apron in front of the terminal was deteriorating quite rapidly. The apron in front of the hangar—it is one, two, three, four, and partially in front of Hangar No. 5—was deteriorating quite rapidly.

I observed that taxiways leading to these aprons were deteriorating. There were some heavy aircraft operating and it became necessary as an emergency procedure to at once prepare means of preventing a complete collapse and airplane wheels crushing into

(Testimony of George D. Burr.)

the pavement, through the pavement into the soft mud beneath.

Mr. Thomson: Q. About what date did you make this observation?

A. It was in May, about May of 1947.

Q. Amongst these hangars that you have described by number, were any of those in occupancy by TWA?

A. Hangar No. 4 was, to my knowledge. I believe Hangar No. 5 was, at that time too.

Q. Mr. Burr, you have with you certain photographs? A. Yes.

Q. I will have to show these to counsel before I can ask you to describe them.

A. This photograph——

Q. No, don't say anything now. I will show these to counsel (handing photographs to counsel). [287]

Mr. Thomson: Q. Mr. Burr, I will show you this photograph here and ask you what that depicts?

A. This is a photograph of San Francisco Airport taken from the southwesterly direction, showing the Airport as it existed on the completion of Airport Contract No. 82.

Q. What date was that, approximately?

A. That was—I would refresh my memory on that—that was May, 1947, or possibly in June.

Mr. Thomson: I was mistaken in what I told you, Mr. Dyer. I will ask that this photograph be admitted into evidence.

Mr. Dyer: I will object to that, if Your Honor

(Testimony of George D. Burr.)

please, on the ground that it is incompetent, irrelevant and immaterial. And no foundation has been laid to show that there was no contemplation in the minds of the parties that planes in excess of 25,000 pounds gross take-off weight would come into use after the date of this.

The Court: It may be admitted and marked.

Mr. Dyer: In order to save the Court's time, may it be deemed I am objecting to all these photographs?

The Court: It may.

Mr. Dyer: And all this evidence along this line?

The Court: Let the record so show.

The Clerk: Defendants' Exhibit I, in evidence.

(Photograph referred to was marked Defendants' Exhibit I in evidence.) [288]

Mr. Thomson: Q. I show you the next photograph, Mr. Burr, and ask you what that depicts and as of what date?

A. This photograph with the "B" marked on the back of it is a photograph of—aerial photograph of the San Francisco Airport as of May 15, 1940, as viewed from the southeasterly direction, and show the extent and the landing field as it existed in 1942, with the exception that pavement had been laid on runway eighteen thirty-six—that is 18-36—and 10-28, to the extent of 4,500 feet on runway 18-36 and 6,000 feet on runway 10-28.

Mr. Thomson: I will offer this photograph last described by the witness in evidence.

The Court: It may be admitted and marked.

(Testimony of George D. Burr.)

The Clerk: Defendants' Exhibit J admitted and filed in evidence.

(Thereupon photograph referred to above was marked Defendants' Exhibit J in evidence.)

Mr. Thomson: Q. I show you this photograph, Mr. Burr, and ask you what it depicts and as of what date?

A. The photograph in my hand was taken October 16, 1938, and depicts the apron in front of the Airport Terminal. It is the same configuration of apron, and for the most part the pavement is the same pavement that existed in that area on October 1, 1942. It also shows Hangars No. 1, 2, 3 and 4.

Q. The apron you referred to is the same apron that you have [289] previously described in your testimony?

A. That is correct. I said for the most part the pavement is the same. The taxiway showed asphaltic—this shows asphaltic pavement at the time of it. It was subsequently changed to concrete pavement and concrete pavement existed in 1942.

Mr. Thomson: I will offer this last photograph described by the witness in evidence and ask it be admitted into evidence.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit K admitted and filed in evidence.

(Testimony of George D. Burr.)

(Thereupon photograph referred to above was marked Defendants' Exhibit K and admitted into evidence.)

Mr. Thomson: I have just one more photograph, Your Honor.

Mr. Thomson: Q. I show you this photograph and ask you to describe what it depicts and as of what date?

Mr. Thomson: That was, according to the testimony of the witness, 1938.

The Court: That is the first one?

Mr. Thomson: Oh, pardon me, I thought you were referring to the last one.

The Court: It isn't marked.

Mr. Thomson: Q. Mr. Burr, may I interrupt you a minute? Go back to this first photograph. I believe you testified a certain date. What did that represent? [290]

A. On the back of it I will write the approximate date.

Mr. Thomson: Will that be agreeable with reference to the year, Your Honor?

The Court: No objection to that?

Mr. Dyer: No objection.

The Court: We want it identified is all.

A. Which, as I previously testified, was about May or June, 1947.

Mr. Thomson: Q. Now, we will take these in order. Will you kindly mark——

A. There is a photograph here that has not been identified.

(Testimony of George D. Burr.)

Q. I understand. We haven't gotten to that yet. Will you kindly mark the condition of the Airport as of a certain date depicted in that photograph?

A. It is essentially the Airport that was constructed at the time the lease was entered into with TWA.

Q. Suppose you mark this, then. I would suggest you mark this October, 1942, which is the date of the lease.

A. It isn't—. The picture was taken May 15, 1940.

Q. Yes, but you testified—I think in the interest of clarity it will be agreeable to His Honor and counsel to put down the date of October, 1942, because that is the date the photograph depicts, regardless of the time of taking. Do you see what I mean? You have testified it depicts the condition in October, 1942. [291]

A. It would take considerable writing. As I mentioned in the testimony, one depicts the difference. The difference is—

Q. (Interposing) You outlined that in the testimony. That will be perfectly clear.

Mr. Dyer: I would like to be clear on this. Mr. Burr, does that represent the condition shown in that picture in October, 1942?

The Court: 1940.

Mr. Dyer: 1940?

The Court: If I followed his testimony.

Mr. Thomson: The photograph was taken in 1940, but he testified that with certain exceptions

(Testimony of George D. Burr.)

which he described it depicted the condition in 1942.

A. The landing is identical but the pavements were added.

The Court: I understand, but I want to know definitely the date the photographs were taken.

Mr. Thomson: If that is what Your Honor prefers, we will do it that way. Suppose we clear this up after luncheon?

The Court: You may.

(Thereupon this cause was adjourned to the hour of 2:00 o'clock p.m. this date.) [292]

GEORGE D. BURR

called as a witness on behalf of the defendant, resumed the witness stand, previously sworn.

Direct Examination—(Resumed)

Mr. Thomson: Q. Mr. Burr, before adjournment you were about to identify this photograph which I now hand you. What does that depict?

A. The photograph in my hand depicts the existing terminal area. The photo was taken on April 1st, 1951 and shows in essence how the aprons and adjacent taxi-ways were reconstructed in order to carry the heavier aircraft and larger volume of business.

Q. Was this photo taken after your reconstruction? A. It was.

Q. Would you be good enough to mark the date

(Testimony of George D. Burr.)

when it was taken in accordance with what you have done on the other three? A. It is marked.

Mr. Thomson: I will offer this in evidence, if Your Honor please.

The Court: Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit L admitted and filed in evidence. [293]

(Thereupon photograph identified above was received into evidence and marked Defendant's Exhibit L.)

Mr. Thomson: Q. Mr. Burr, I have been requested to ask you to speak a little more loudly. I have probably been guilty of the same fault myself.

I will hand you this photograph, Mr. Burr, and ask you what that represents?

A. The diagram in my hand is an aerial photo of the San Francisco Airport taken about the year 1931 and on which has been marked in white the various stages of development.

Q. Those markings in white figures are additions to the photograph?

A. They are additions, yes.

Q. And do those markings bring the improvements and development at the airport down to date?

A. Approximately to date. There have been a few additions beyond what is shown in here—a number of additions.

Q. Do you want to, in the interest of clarity for

(Testimony of George D. Burr.)

the record, enumerate those additions that are not shown, very briefly?

A. It has been necessary to extend the length of Runway 10-R, 28-L.

Q. To what extent?

A. Oh, about 500 feet. It has been necessary to add a warm-up apron at the easterly end of that runway. [294]

It has been necessary to extend Runway 19-R and 1-L to the north about 700 feet and add a warm-up apron at both ends of that runway, and add a considerable number of taxi-ways for the safe and convenient operation of aircraft.

Mr. Thomson: I will offer this document last described by the witness in evidence, Your Honor.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit M admitted and filed in evidence.

(Thereupon photograph identified above was received into evidence and marked Defendant's Exhibit M.)

Mr. Thomson: Q. I will hand you this photo that appears to be an aerial photo and ask you to describe what that depicts?

A. The photograph in my hand was taken in about December 1950. It shows the general configuration of the landing field about as it exists today. Again, there have been additions since that, the total cost of which are in the neighborhood of ten to twelve million dollars.

Q. The additions?

A. Yes.

(Testimony of George D. Burr.)

Q. Are they substantially of the nature you described with reference to the diagram?

A. Yes. In addition there is a new terminal. There are additions to the runways and taxi-ways and aprons, however.

Q. The date when this was taken appears here at the back, [295] does it not?

A. It is written on the back.

Mr. Thomson: I offer this in evidence as our next exhibit, Your Honor.

The Court: It may be admitted.

The Clerk: Defendants' N admitted and filed in evidence.

(Thereupon the photograph identified above was received into evidence and marked Defendants' Exhibit N.)

Mr. Thomson: Q. Mr. Burr, I hand you this diagram which is labeled "Master Plan", and I will ask you to describe to His Honor what these different colors of blue and yellow upon that diagram represent?

A. The plan in my hand, with the file number RA10511, revision number 8, is the current general plan of the San Francisco Airport. The marking that is shaded in blue depicts the Airport and its landing field as it existed on October 1st, 1942, which was its condition at the time the lease was entered into with TWA. The yellow areas are the additional areas that it has been necessary to construct at a total cost of in excess of forty million dollars.

(Testimony of George D. Burr.)

The Court: Is TWA confined in that blue area still?

The Witness: This was the whole Airport as at that time and was intended to be all of the airport that we would need during the life of——

The Court: Maybe I confused you. Are they within that [296] area now or do they utilize——

The Witness: They utilize this entire field which is the field depicted in the exhibit which you have in your hand.

Mr. Thomson: Q. In other words, I take it, Mr. Burr, that TWA uses runways as extended?

A. The runways, taxi-ways and aprons.

Q. That presently exist?

A. And the other facilities, including lighting and drainage and the other aids to air navigation and facilities such as approach lights and radio.

Mr. Thomson: If Your Honor please, I offer this in evidence as our next exhibit.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit O admitted and filed in evidence.

(Thereupon diagram identified above was received in evidence and marked Defendants' Exhibit O.)

Mr. Thomson: Q. I refer you to Defendants' Exhibit H, consisting of a compilation of figures, Mr. Burr, and you testified as I recall, that that was prepared under your direction?

A. That is correct.

Q. After the preparation of that exhibit what did you next do?

(Testimony of George D. Burr.)

A. An analysis was made of the entire situation with the conclusion that for the foreseeable future—by that I mean [297] within at least ten years—a field designed for capacity operation for aircraft of maximum weight of 25,000 pounds would be sufficient. A field so designed would permit limited operation of aircraft of the weight of about 40,000 pounds, and occasional operation of aircraft up to about 75,000 pounds. The field was adequate for those purposes and if aircraft had not exceeded those weights, it would still be used.

Q. I call to your attention, Mr. Burr, one item on the first page with reference to Boeing, and that is the item of 70,000 pounds.

A. Yes.

Q. Did you receive that information as to the possibility of a plane of 70,000 pounds?

A. The information came in a letter that Boeing Aircraft Company asked us to keep confidential, and it was an intended design. The aircraft was never built and never used.

Q. How did you regard that information as to the 70,000 pound plane when you received it?

A. I considered it an extremely remote possibility; that is, that if such an aircraft ever were used, it would be used in such a small proportion of the total aircraft as to have no bearing on the design; it would have been within the very limited operation under 75,000 pounds that we could handle with the facilities we were building. [298]

Q. Will you explain to us, please, Mr. Burr, the

(Testimony of George D. Burr.)

distinction that you have referred to in engineering concept between frequent operation and infrequent operation and what effect those two respectively have upon an airport?

A. Perhaps I could illustrate that best by a confidential report prepared by the United States Engineers, Office of District Army Engineer, dated the 14th of July 1944, and finally revised the 10th of April 1945. This report was prepared at the instigation of the Chief of Engineers by letter dated August 1943, at the time the increased weights of aircraft in use became apparent through the war time development.

So at the time he finished this report—that is the District Engineer finished the report—he came to the conclusion that for the definition of capacity operation as the Army Engineers and the Air Force use it, which is a heavier design than is normal for civil aircraft—that for capacity operation the air field was limited to 18,000 pounds and for limited operation it was limited to 28,000 pounds.

Now to make it plain, in direct answer to your question as to what he intended by capacity operation. As defined by the Army Engineer, "Capacity operation is defined as the maximum traffic that can possibly operate on an air field for a period of approximately 20 years. The daily operation may be assumed as varying from 100 for very heavy airplanes [299] to 1500 for very light-weight airplanes."

(Testimony of George D. Burr.)

Q. What is meant by those figures?

A. The Army and the Air Force in 1945 at the date of this report considered a heavy bomber or a heavy transport as weighing between 30 and 65 thousand pounds. That was the limit which the design concept had reached.

Shall I proceed with the definition?

Q. Yes, please.

A. "Limited operation is defined as few operations a day for a period of approximately 20 years; that is, about 10 per cent of the capacity operation, or as the maximum traffic that can possibly operate for a period of two to four years. However, the use of pavement rated for a limited operation by the maximum traffic that can possibly operate for a period of two to four years may entail a greater yearly maintenance than would a field rated for capacity operation.

"Repetition of loads is a factor in the design of both flexible and concrete pavements. One or two or even a hundred landings made by a very heavy plane on a pavement designed for lighter loads is relatively insignificant. For example, no immediate damage or break-through will occur if a plane having a gross weight of 120,000 pounds lands on a pavement properly designed for capacity operation of planes [300] having a gross weight of 30,000 pounds. However,"—

The Court: Pardon me. Would you elaborate on that? Go back?

(Testimony of George D. Burr.)

Mr. Thomson: I think His Honor wants you to read back.

The Witness: Read this?

The Court: Yes.

Mr. Thomson: Read it slowly.

The Witness: Repetition of loads is a factor in the design of both flexible and concrete pavements. One or two or even a hundred landings made by a very heavy plane on a pavement designed for much lighter loads is relatively insignificant. For example, no immediate damage or break-through will occur if a plane having a gross weight of 120,000 pounds lands on a pavement properly designed for capacity operation of planes having a gross weight of 30,000 pounds."

In other words, Your Honor, the concept there is, as enunciated by the Army, that a pavement designed for capacity operations of 30,000 pounds could take occasional landings and take-offs of planes weighing about 120,000 pounds, which follows our design concept without knowledge of this report at the time, that if we designed for a capacity operation of 25,000 pounds, we could take occasional landings of aircraft weighing up to 75,000 pounds without serious trouble. [301]

The Court: Go ahead. I may add I am having some difficulty following this. Proceed. And I say that kindly. Can I get any help from either side here?

Mr. Thomson: Well, I take it, Your Honor, that the witness and the author of that report is endeavoring

(Testimony of George D. Burr.)

oring to find out—it is somewhat similar to a figure of speech I might use, skating on very thin ice: If you go fast enough and you do it just once in a while, you can get away with it. And I think the same situation from the standpoint of engineering is true with respect to the Airport. What I have said is just about correct, Mr. Burr, from an engineering standpoint?

The Witness: That is correct; it takes actual work to——

The Court: All right. What is the necessity of this?

Mr. Thomson: It is consistent with out contention that we did not anticipate regularly scheduled air flights of these tremendous weights coming down in uniform and definite schedules of a number per day. That is the theory of this testimony, Your Honor.

Mr. Dyer: Your Honor, I take it that this testimony is going in subject to the objection that we made at the start of this testimony; and I might point out at this time that the reference here for instance is to capacity operation of the Airport, which we understand is the maximum number of movements that the field will take. And I don't think that [302] that is applicable to TWA. I think the evidence is very clear in this case that at the times in issue here that we either did not have any heavy planes in use over 20,000 pounds, and to the extent that the evidence herein refers to a period after April 1, 1945, that we had at most one landing

(Testimony of George D. Burr.)

and one take-off a day for planes of 54,000 pounds gross take-off weight. Mr. Messersmith testified that that was a relatively minor use. So it would seem to me that this evidence is wholly irrelevant and immaterial as applied to the situation at issue here.

Mr. Thomson: I take it, Your Honor, there is no borderline on 1945. The situation still prevails today and projected into the future with which Your Honor will be concerned.

The Court: I was the one who was confused and I was trying to have you gentlemen take me out. Proceed.

Mr. Dyer: With reference to Mr. Thomson's remarks, may I point this out: that the pleadings show that in 1946 they undertook to repair the Airport and completed those repairs in 1948, and that since that time these runways have been entirely adequate to take very heavy planes, not only planes operated by TWA but planes of much heavier weight. I think the crucial time in this case is the time before 1946, and I believe that the evidence is quite clear that at that time we operated planes of relatively light weight and operated them very infrequently, and I believe this evidence goes to a [303] great extent to capacity operation in the Airport by heavy planes. I don't think that is at all binding on TWA or applicable to the situation here.

Mr. Thomson: I don't think, counsel, that you have successfully followed the testimony of this witness in the definition of capacity operation. That

(Testimony of George D. Burr.)

is clearly defined there, and I will ask Mr. Burr to go back to that point.

Mr. Dyer: I think we have made our position clear, Your Honor. I would like it to be understood that my objection runs to all this line of testimony.

The Court: The record so shows. Proceed.

Mr. Thomson: Q. Have you finished, Mr. Burr, in reference to the extract? If you have, temporarily——

A. No, sir.

Q. I am going to put another question to you.

A. Temporarily.

The Court: Proceed.

Mr. Thomson: Q. Do you want to proceed? Very well.

A. "However, repeated operation would soon completely destroy the pavement. Heavy planes can operate on pavement designed for lighter planes for a short period of time or a few repetitions, but it is emphasized that this does not mean such pavements are adequate or will be satisfactory for limited or capacity operation. Continued use by planes heavier than the pavement [304] capacity will mean excessive maintenance or complete reconstruction prior to the anticipated life stated above."

Another definition of capacity and limited operation——

Mr. Dyer: Pardon me, Mr. Thomson: I wanted to refresh my recollection on it. Would you identify the document the witness has been reading from?

Mr. Thomson: Let the witness identify it.

Mr. Dyer: Thank you.

(Testimony of George D. Burr.)

A. The document being read from is titled "Restricted; U. S. Engineers Office, San Francisco, California. Air Field Pavement Evaluation Report, San Francisco Municipal Airport, dated 14 July 1944; Final Revision 10 April 1945."

Mr. Dyer: May I see that document, please?

The Witness: (The document was handed to counsel.)

Mr. Thomson: My next question relates to the document, so I will wait until you finish your inspection.

Mr. Dyer: Thank you (returning document to witness).

Mr. Thomson: Mr. Burr can put it in your possession during recess if you would like to look at it further, gentlemen.

Q. Mr. Burr, is there any classification or evaluation of the capacity of the San Francisco Airport as shown in that report?

A. The report of the Army Engineers gives an evaluation of the pavement for capacity operation as 18,000 pounds and for [305] limited operation as 28,000 pounds. Our own—as I previously testified, the Army's definitions are for 20 years operation without high maintenance cost. Our conception has been roughly for in excess of ten years. Therefore our evaluation of the pavement for capacity operation was 25,000 pounds and for limited operation 30,000 pounds and for occasional operation only of 75,000 pounds. If we would have planes in excess of 75,000 pounds, such as the Lockheed

(Testimony of George D. Burr.)

Constellation, we could expect immediate failure, and that is exactly what happened.

Q. Is there any enumeration in that report of the weights of Army bombers or Army transports?

A. Very heavy bombers and transports are classified as between 30 and 65 thousand pounds in 1945.

Q. Is there any enumeration in that report of the number of trips per day into the San Francisco Airport of bombers or transports?

A. Yes, there is.

Q. What is set forth in that connection?

Mr. Dyer: Will you fix the time, please? May I have that done?

Mr. Thomson: These times are given year by year and will be enumerated by the witness. The date of the report you already have. It takes it up year by year. [306]

A. In the year 1940 the traffic history as compared by the Army Engineers at the San Francisco Airport for heavy bombers and heavy transports of the weight of 30,000 to 65,000 pounds gross was eight one-hundredths, or was one trip a day; in 1941 was fourteen one-hundredths, one trip a day. In 1942 it was 5.5 trips per day. In 1943 it was 10 trips per day. And currently, which is the date of the report in 1944, 14 trips a day.

And a trip is defined as a landing counting as one unit and a take-off as one, so that would compare to an airline schedule, two units of that would equal one airline schedule.

(Testimony of George D. Burr.)

Q. If I understand you correctly, where it says, for example, "10 trips a day" you would have to divide by one-half to get the number of landings?

A. That would be five schedules.

Q. And one-half to get the number of take-offs?

A. That is correct.

Q. In your further planning of the Airport did you place any reliance upon that report from which you have read, from the Army?

A. Yes. It has been extensively used in the construction following the 1945 bond issue.

Q. Now, I have reference at present, Mr. Burr, to the work of improvement at the Airport commencing in May of 1946 and being completed in May of 1947. Will you describe to His Honor [307] in general the nature of that work?

A. Could you repeat that?

Q. Yes. I have reference to the work of improvement at the Airport which commenced in May of 1946 and which was completed one year later, in May of 1947.

A. That, I presume refers to Airport Contract No. 82?

Q. Yes.

A. That was in general for the extension of the landing fields, and comprised primarily about 6,000,000 yards of fill, some pavement, some drainage, and some other work, the cost of which was \$4,352,350.71. It is shown on the exhibit titled "Master Plan" and marked "Airport Contract No. 82".

(Testimony of George D. Burr.)

Q. What relationship did the drainage have to the remainder of the work?

A. The drainage was primarily appurtenant to the fills being placed, although there was other drainage, too, that went in with it.

Q. By the way, to digress for a moment, you have already testified to the improvement of the apron area immediately adjacent to the present Terminal Building. Just about what was involved in that work?

A. The apron immediately east of the Airport—the existing Airport Terminal Building, as I previously testified, had failed soon after the Lockheed Constellations began to operate from it to such an extent it was impractical to conduct operations [308] of the Airport unless immediate actions were taken.

An emergency purchase was made of so-called B-29 steel landing mats which covered the area, and the contract was rushed out.

That contract was titled “Airport Contract No. 96.” The apron was improved sufficiently to carry the loads that were then currently operating at a cost of about \$525,000. The nature of that repair was to raise the level by adding pavement materials a distance of two to three and one-half feet.

Q. That was an increase in height?

A. That is correct.

The Court: Is that what you call a loading strip?

A. That is the apron on which the aircraft un-

(Testimony of George D. Burr.)

loaded their passengers and cargo and at which they are loaded while they stand.

The Court: That is what the records describe as a loading strip?

Mr. Thomson: Yes, Your Honor, that is the correct term.

Mr. Dyer: Yes, it is a loading strip, I understand, sir, not only for TWA but other airlines.

Mr. Thomson: The testimony of this witness was that he discovered defects in the loading strips, inclusive of the area immediately adjacent to TWA hangars.

A. Your Honor, on Plaintiff's Exhibit—rather, Defendants' Exhibit L, the apron referred to is this I am delineating [309] (showing document to the Court) that is immediately east of the existing Airport Terminal Building.

The Court: The language of the previous witness referred to a loading strip. Where would that be?

A. That is where the loading strip is, down here (indicating).

The Court: All that area?

A. Yes, the various positions there.

The Court: That is what I was trying to ascertain. All right.

Mr. Thomson: Q. Mr. Burr, was that increase in the length or the width of those aprons, or rather that loading area?

A. In order to accommodate the increase—rapidly increasing volume of business, number of air-

(Testimony of George D. Burr.)

line trips, the width of the apron was increased from 251 feet to 661 feet. It was also lengthened.

Q. Do you recall the extent of the lengthening, offhand, approximately?

A. Not offhand. I could scale it. Very substantial.

Q. Now, I am referring to some work at the Airport initiated in April, 1947, and completed in March of 1948. Have you in mind the nature of that work?

A. The work I presume you refer to is Airport Contract No. 93?

Q. That is correct.

A. Which was constructed at a cost of \$3,-745,595?

Q. Yes. [310]

A. It involved primarily about 5,000,000 cubic yards of fill to extend the landing field, including some pavement, some drainage and other miscellaneous cost, primarily appertaining to the construction of these fills which extended the landing field.

Q. When the runway was extended in the manner you described, in which direction of the Airport was it extended?

A. Extended in a southerly and easterly direction, primarily.

Q. Well, was that on dry land or out into the Bay?

A. It was out into the Bay, reclaiming lands that were formerly under water.

(Testimony of George D. Burr.)

Q. What was the reason for going out into the Bay?

A. The extension was placed to the east and south primarily in order to improve the traffic circulation plan and for the safety of the aircraft and communities adjacent.

It allowed the aircraft on take-off to turn before reaching many of the built up communities and thereby add to the safety of the passengers, the aircraft and the communities. And further, it allowed them to turn short of the higher ground that rises to the west.

I have an exhibit here, if you would care to see it, to illustrate the point.

The Court: Do they go across the Bay?

A. No, sir, up around the Skyline Boulevard.

The Court: Around Skyline Boulevard? [311]

Mr. Thomson: Q. I think His Honor might be interested to see that picture you refer to, Mr. Burr.

A. The drawing I have in my hand is titled "Topographical Vicinity Map", and written in lead pencil on it is, "To conform with TSON-18 of April 26, 1950". The file number is CA-10594.

The Court: Now, where do those runways go from the water?

A. The Airport as it existed in 1942 was about in this area (indicating). It extended to the east, into the waters of San Francisco Bay and to the south, primarily over waters of San Francisco Bay.

You will notice these contours delineate the higher ground. It was impractical to extend in this

(Testimony of George D. Burr.)

direction as it would bring the landings—the take-offs to these hills, and also for the safety of the communities allows these turning zones to be going east to avoid an excessive number of turns over the build up communities adjacent to the west.

Mr. Thomson: Q. I would like to have that diagram, Mr. Burr, to which you have just referred. I offer this diagram which has been discussed in evidence, Your Honor please.

The Court: It may be admitted next in order.

The Clerk: Defendants' Exhibit P admitted and filed in evidence.

(Thereupon diagram referred to above was marked Defendants' Exhibit P and admitted into evidence.) [312]

Mr. Thomson: Q. Mr. Burr, you mentioned this figure of \$3,745,000 on this contract we have just been discussing. You described the work in general. Is there anything you wish to add?

A. The work was essential to handle the heavier aircraft and the aircraft of higher performance characteristics, to safely conform to the Civil Aeronautics Administration Order T6A which defines the requirements for an Airport handling this type of aircraft.

Q. Now, I refer you to certain work that was initiated in August of 1947 and completed in February of 1948. Will you describe in general and in substance the nature of that work?

A. The work you refer to is Airport Contract No. 96?

(Testimony of George D. Burr.)

Q. That is correct.

A. To the pavement, drainage and related work. The work was primarily for the repair of the apron lying just east of the existing Terminal. It also was for construction of a taxiway, so-called Taxiway No. 5.

The first concrete pavement at the Airport as thick as 13 inches was constructed under this contract. Under contract 82, previously described, the pavements were constructed of concrete 11 inches thick. Previously the Army in constructing what they considered heavy pavements, the pavements were 10 inches and thinner in thickness. We are now constructing pavements up to 16 inches in thickness to carry current weights [313] of aircraft.

The Court: Do you put that down on top of the old construction?

A. Yes, Your Honor. Many times we have had to build up as much as five feet in thickness over the old pavements.

Been tremendously expensive.

Mr. Thomson: Q. Do you recall, Mr. Burr, what you did with the landing mats that you have been mentioning in your testimony?

Mr. Dyer: I object to that, Your Honor. It is obviously irrelevant and immaterial, what he did with them. I don't think it has any bearing on the issues in this case.

Mr. Thomson: I am going to prove to this wit-

(Testimony of George D. Burr.)

ness they were left there and a separate charge for those. They were simply left in the pavement.

The Court: Proceed.

Mr. Thomson: Q. Do you recall how the landing mats you have testified to were dealt with?

A. The steel landing mats were laid over the then-existing concrete pavement for practically its whole area at the apron east of the existing Terminal Building and on the adjacent taxiway, and as the pavement was built up in thickness to two or three and one-half feet, as I previously described, they were buried and incorporated into the new pavement.

The Court: In other words, you left them there?

A. That's right.

Mr. Thomson: Q. Do you recall the cost of those landing mats?

A. I do not recall at the moment.

Q. In your memorandum there the figure of \$953,954.95, which is the figure you just testified to. Did you see anything there in connection with that figure which would be indicative of landing mats?

A. I personally prepared this table, which had several hundred items on it, and I may have put it in there but I can't find it at the moment.

Q. I will withdraw the question.

What is the grand total of the improvements in the common use facilities of the Airport expended since 1942?

A. The improvements expended for improving the common facilities at the Airport for the period

(Testimony of George D. Burr.)

of October 1, 1942, to March 9, 1951, were \$23,811,644.16. There have been extensive improvements put in since that time, however.

Q. Could you approximate that figure, confining it to common use facilities?

A. If the new Terminal now under construction is defined as a common use facility, the expenditure would be in the neighborhood of \$12,000,000.

Mr. Thomson: You may take the witness. [315]

Cross Examination

Mr. Dyer: Q. Mr. Burr, as I recall your testimony, you took a temporary leave from your duties at the Airport to serve in the Army of the United States in 1940, is that correct?

A. That is correct.

Q. And you were thus not actively employed by the City in 1942 when this lease was executed, is that true, sir?

A. That is true.

Q. And you at no time were employed in your personal capacity as Airport Engineer during the war years, isn't that correct?

A. That is true. Not employed or receiving pay for it.

Q. During the period of 1944, which I understand is the period covered by that report that you adverted to, you were not then in close contact with the activities of the Airport, were you?

A. Yes, I was.

(Testimony of George D. Burr.)

Q. You were not then in your capacity as Airport Manager, were you, sir?

A. No. As previously testified, I was the Engineer Officer of the Harbor Defense in San Francisco in that period, on close contact with the District Engineer, United States Army, in that capacity, and also was a frequent visitor at the Airport.

Q. Yes. You left this country, as I recall your testimony, [316] in 1945 and returned sometime in 1947?

A. That is correct.

Q. And you were thus not at the Airport yourself or in touch therewith personally during the period when the Boeing Stratoliner first came into use, isn't that so?

A. I wasn't in this country, but I wouldn't say I wasn't in touch with them entirely.

Q. And you were not in this country when the Constellation first came into use, isn't that so, sir?

A. I wasn't in this country.

Q. With reference to the report of 1944 to which you have referred, was that information gained by somebody else or was it gathered by yourself?

A. I did not understand the first part of that question.

Q. Let me put it this way, Mr. Burr: Did you personally participate—. Did you personally prepare the data which appears in the 1944 report referred to by you?

A. The report? Are you referring to the report of the Army Engineer?

Q. Yes, sir, I am.

(Testimony of George D. Burr.)

A. That was prepared by the Army Engineer's office.

Q. It wasn't prepared by you?

A. It wasn't prepared by any City employee.

Q. Yes. And it wasn't prepared under your direction?

A. It wasn't prepared under the direction of any City [317] employee. It was prepared by the United States Army Engineers. It was classified at that time. The only copy in existence that I know of is a photostat that I obtained after I returned from military duty, which is the copy that we have had before us.

Q. So the data contained in this report, that isn't derived from your own knowledge of it, sir? It is derived from somebody else's investigation or knowledge, that is correct, that is, the Army Engineer?

A. That report, as I mentioned, was merely presented to substantiate the same line of opening approach to design of Airport by the United States Engineer's Office as we use in our own office.

Q. I see.

A. Prepared independently of our office.

Mr. Dyer: Your Honor please, at this time in addition to the grounds for the motions which I will make to strike, I wish to add to those grounds the motion that this report is entirely hearsay, and I move to strike it on that basis.

Mr. Thomson: Your Honor please, the report was read by the witness with the acquiescence of coun-

(Testimony of George D. Burr.)

sel in that no objection was put to it. I take it counsel has no right to make a motion to strike without at least objecting in the first instance.

Mr. Dyer: If the Court please, I understood that I was [318] objecting to all this testimony, and that at the proper time some more motions to strike would be made; and at this time I simply wish to indicate clearly to the record the ground upon which that motion will be made.

The Court: Why didn't you make a motion directly in relation to this report?

Mr. Dyer: Because it didn't appear at the time, sir. This testimony went in along with all the other, and it didn't appear that this report was based on knowledge and information of somebody else.

Mr. Thomson: I think, your Honor, in all fairness a special objection should have been interposed. While it is true counsel has objected in the form of a blanket objection, his objection was not specific enough to cover this particular ground of hearsay. He objected on the general ground that no evidence should be received at all as to this report. His objection was blanket, and he has been accommodated by the ruling on the part of the Court, to which I, in my small capacity, acquiesced that his objection as made would be deemed to follow evidence along that line.

But here we have for the first time a special objection that this is hearsay. That objection has never been covered by the blanket objection, and the evidence having been received without objec-

(Testimony of George D. Burr.)

tion, not covered by the blanket [319] objection, is not now subject to a motion to strike.

Mr. Dyer: I believe the record will show, your Honor, that along with the other grounds of objection I have made I have indicated to your Honor that some of these documents are subject to the objection of hearsay.

Mr. Thomson: I have heard no such objection.

Mr. Dyer: May I also point out that this testimony was given by way of oral testimony by this witness, and there was no opportunity given to counsel at the time, under the understanding that a motion to strike would be made and that a blanket objection was interposed to all this testimony, to take the witness on voir dire at the time.

The Court: Counsel, this document——. Well, it is hearsay, and I don't think for the purpose of the case that it would be well to make up a record under those conditions.

Mr. Thomson: Well, I am mindful of the rule that hearsay is sometimes very strong evidence itself and is admissible unless objected to. I wouldn't have the slightest fear about the record in case it was considered by your Honor.

The Court: Very well, for the purpose of the record indicate the purpose of the offer of this document.

Mr. Thomson: I have made no offer of the document. The witness, though, referred to this document and did so without objection, as an expert witness.

(Testimony of George D. Burr.)

The evidence was completely brought out by the attorney [320] for the plaintiff in this case about these Army planes and their weights. Here, for example, is something from the Army confirming their theories of the weights of planes—of their own planes. From that standpoint it is pertinent, your Honor.

The mere fact that it is hearsay doesn't deprive it of any relevant force. Courts have continually held that hearsay received without objection can be considered by the Court. And I consider this the strongest character of evidence, even though it is hearsay, because it emanates from an official Government report on this very subject.

The Court: Well, let's have the record clear on the purpose of the offer.

Mr. Thomson: The witness referred to this document in review of what the Federal authorities had ruled upon in a report, and in confirmation of this witness' own program in design of the Airport. From that standpoint I think it is extremely relevant. The document went on further to draw an engineering distinction, which is also drawn by this witness and by Mr. Messersmith, as to the strain upon the Airport of regular scheduled operations and spasmodic or infrequent operations. That is in there very definitely, in the report, and in confirmation of this witness' own engineering opinion.

The Court: We can agree on the fact that this witness is an expert? [321]

Mr. Dyer: Yes, sir, I will agree that this wit-

(Testimony of George D. Burr.)

ness is a registered professional engineer and that he has had the experience testified to by him at the San Francisco Airport.

May I point this out to your Honor, that this was oral testimony and he was referring at times directly and at times inferentially to a report that he was holding in his hand. As counsel points out, at no time was this report as a document offered in evidence. Thus, there wasn't any opportunity afforded counsel for the plaintiff to cross-examine this man on the source of the information on which he was testifying at the time, and we were not able to take him on voir dire. And this, in connection with the understanding that the general objections we had made theretofore went to all this testimony. I think it deprived us of an opportunity until we took him on formal examination to inquire into the content and matter of the source of this information testified to by him and thus have an opportunity to get into the objection of hearsay.

It would thus seem at this time, your Honor, a motion to strike on that ground is most appropriate.

Mr. Thomson: If your Honor please——

The Court: Just a moment. I am prepared to rule.

Mr. Thomson: Excuse me.

The Court: You can submit your motion. I will not pass on it at this time if you wish to make up a record, if that is agreeable. [322]

Mr. Dyer: I don't understand your Honor.

The Court: You can submit your motion and I

(Testimony of George D. Burr.)

shall not act on it until the record is made up, so that you may save any legal point, if it has any merit, and I will not pass on it at this time.

Mr. Dyer: 'Thank you, your Honor.

Mr. Thomson: If your Honor would permit me, I don't wish to unduly prolong this argument, but I do want to respond to something counsel said, if your Honor will indulge me.

The Court: Yes?

Mr. Thomson: Counsel used the phrase "general objection". I know of no such phrase in the law of evidence. His objections must be specific. There is no such thing as a general objection, and no specific objection was ever made that this was hearsay.

It was quite evident to everyone that the witness was reading from a document. There was an opportunity to take him over then and there if counsel wanted to, to find out what he was reading from.

Mr. Dyer: Your Honor, I think I have made my objection on specific grounds, and I don't think it would be of benefit to counsel or the Court to go into it at this time.

The Court: I had my mind fixed on it myself. I am satisfied the record does not disclose you made an objection to the document or to the contents. I could stand corrected [323] on that, don't misunderstand me. However, the record is being made up and you will have an opportunity to point out what the record discloses.

Mr. Dyer: Yes, sir.

Mr. Dyer: Q. Mr. Burr, I take it in the light

(Testimony of George D. Burr.)

of the information contained, obtained from the various airplane companies, you had knowledge that planes in excess of 25,000 gross take-off were in process of manufacture in 1940, 1944, 1942?

A. Yes, they were in the process of manufacture in 1940 and 1942.

Q. They were 4-engine planes, were they not, sir? A. Yes.

Q. Now, I notice that you referred to certain information concerning the number of bombers that used the Airport during the war years. Did that information also include the number of military cargo planes and military transport planes that used the Airport?

A. As I previously testified, the document I was reading from was not in my hand at that time. It was given to us by Dr. Robert Hornonjeff of the Army Engineer's Office in 1947.

Q. I see. But did that data which you referred to include any reference to the number of cargo planes and the number of military transport planes which utilized the Airport during [324] the war period?

A. The document recited that heavy cargo planes and transports were incorporated in the number of bombers as I read it. Heavy bombers and transport as one figure.

Q. Does it include the transport planes, the four-engine Transpacific transport planes which were operated by United Airlines for the United States Government during the war years?

(Testimony of George D. Burr.)

A. It does not specifically say whether it does or does not. It says that was the traffic at that weight category, 30,000 to 65,000 pounds.

Q. Are you familiar with the statement—I believe it was in the 1942-1943 report of the Commission—that during the war 1,350 Transpacific flights were made from the San Francisco Airport by United transport planes?

A. I am familiar with the statement. Yes, I have read it.

Q. In 1940, Mr. Burr, do you have any recollection of the number of arrivals and departures daily from the San Francisco Airport by United Airline planes?

A. I would have to refresh my memory.

Q. Yes, sir, I would be glad to do that.

The Court: Take a recess for a few moments.

(Short recess.) [325]

Mr. Dyer: Q. Mr. Burr, we were discussing the number of arrivals and the number of departures in 1940-41 by United Air Lines planes. I wonder if you would read into the record from the 1940-41 report of the San Francisco Public Utilities Commission this sentence on page 215 of that report which I indicate to you, please.

A. The sentence you requested be read is on page 215 of the 1940-41 report of the Public Utilities Commission of San Francisco, under the heading "Transport traffic, San Francisco Airport."

"The schedule of United Air Lines at San Francisco Airport Number 37 arrivals and 37 departures

(Testimony of George D. Burr.)

daily; service is provided north to Vancouver, south to San Diego, and east to New York and Philadelphia via the mid-Continent route."

Q. Had you concluded, sir?

A. That is the entire sentence.

Q. Now, Mr. Burr, according to your knowledge and recollection, was United at that time the most frequent user of the Airport?

A. The data on flight operation is maintained under the direction of Mr. Messersmith, Superintendent of Airport Operations. The data I would receive would be received from him.

Q. I am asking for whatever information you may have. Do you have any information as to whether or not United at that [326] time was the most frequent user of the Airport?

A. Among the transport airlines, yes.

Q. And has it so continued since 1940 and '41 as the most frequent user of the airport to your knowledge?

A. Yes, they have been the most frequent transport airline—scheduled transport airline.

Q. And they, along with all the other airlines, utilize all the areas of the Airport, do they not—the runways, aids, taxi-ways?

A. The area in common use is in fact used in common among the airlines.

Q. Isn't it a fact that United and other airlines have in operation at the present time rather heavy planes such as the Boeing Stratocruiser at the San Francisco Airport?

(Testimony of George D. Burr.)

A. The present date is 1953, and the statement you have made is correct of that date.

Q. I wonder if you would give us your estimate of the approximate take-off weight of the Boeing Stratocruiser?

A. Approximately 143,000 gross weight.

Q. Is that plane utilized at San Francisco Airport by TWA?

A. No, it doesn't use the apron in question, never has. It has failed. The apron you are speaking of is in the International Airport and it failed from the weight of that plane and had to be replaced at the cost of over a hundred thousand dollars. [327]

Q. To get specifically to the question I put, that plane, the Boeing Stratocruiser, is not utilized by TWA at the San Francisco Airport?

A. No, it is not.

Q. What was your answer?

A. It is not in this Airport.

Q. Mr. Burr, I refer you to the report of 1944 of the U.S. Engineers Office which you referred to on your direct examination. I notice thereon that there is a notation under the column of heavy bombers and heavy transports, 30,000 to 65,000 pounds, of average daily landings and take-offs of 14: is that correct? Would you check me on that, sir?

A. It says, concurrently in 1944—the date is 14 July 1944; I take that to be the intent.

Q. Would you be good enough, Mr. Burr, to read the paragraph under these columns to which I have just referred.

(Testimony of George D. Burr.)

A. Yes, the note referred to reads, "The latest figures on heavy planes are the most important. These figures show that on an average day there is a landing or take-off every four minutes of the entire 24-hour period. The number of heavy planes and their weights probably will increase during the next few years." This is dated 1944, corrected 1945.

Q. And am I correct in my understanding that the reference to heavy planes is a reference to military planes? [328]

A. Not necessarily; those in the category of 30,000 to 65,000 pounds.

Q. So that this note states that the number of those planes within the description stated by you there that it is probable will increase during the next few years?

A. That was the opinion in 1944 and '45, but not in 1942.

Q. Mr. Burr, are you familiar with a document, a trade publication entitled "American Aviation"?

A. I have seen the magazine.

Q. Do you know whether or not that publication has been made available to various representatives of the San Francisco Airport during the period 1940 to the present?

Mr. Thomson: With your Honor's permission, I should like to instruct the witness to answer either yes or no to that question.

The Court: You may answer either yes or no.

A. Your question was: To my knowledge has it been?

(Testimony of George D. Burr.)

Mr. Dyer: Yes.

A. The answer is to my knowledge, no, during the whole period. I do not have knowledge of the whole period.

Mr. Thomson: Just a moment, Mr. Burr. You were asked to answer the question either yes or no.

Mr. Dyer: Q. Mr. Burr, when did you first obtain any notice of the existence of the Constellation type plane?

A. To the best of my recollection about 1943.

Q. When did you first hear that it was being planned? A. About 1943.

Q. Did you construct any documents concerning that plane about that time? Did you draw any documents concerning the characteristics of that plane?

A. I did not draw any documents at that time, no.

Q. Did you make any computations concerning that plane about that time? A. No.

Q. Did you regularly receive information from CAA concerning the types and weights of planes scheduled to come into use?

A. I received information from time to time, but I wouldn't say regularly.

Q. And did you receive it from time to time in 1940 and '41 and before you were in the service of the Government?

A. We received current information, but not necessarily all of it. It isn't automatically mailed by them. It is obtained by conference, by receiving

(Testimony of George D. Burr.)

publication lists, sending for them, and some similar manner.

Q. And among the information that you received from time to time from CAA did you receive airport design information?

A. I don't recall specifically, but perhaps we did. I wouldn't say we didn't.

Mr. Dyer: That is all.

The Court: Step down.

(Witness excused.) [330]

Mr. Thomson: Mr. Dixon.

GEORGE M. DIXON

was called as a witness on behalf of the defendants, sworn.

The Court: Your full name?

The Witness: George Martin Dixon.

The Court: Where do you live, please?

The Witness: 1017 Vallejo Street, San Francisco.

The Court: Your business or occupation?

The Witness: I am manager and chief engineer of the San Francisco Airport Department.

The Court: Proceed.

Direct Examination

Mr. Thomson: Q. Mr. Dixon, are you a graduate of any university? A. No, I am not.

Q. Did you attend any university?

A. Yes, I did.

Q. Where?

(Testimony of George M. Dixon.)

A. University of California.

Q. For what period of time?

A. Four years.

Q. Did you subsequently graduate from any other institution?

A. I graduated from the Naval Air School at Pensacola, [331] Florida in 1928 and took the professional examination and was commissioned in the United States Navy.

Q. When did you enter the United States Navy?

A. The latter part of 1928 as a reserve officer.

Q. When did your activity in the aviation field commence?

A. Well, the first experience I had in aviation was attending an air show in 1911 in Shellmound Park in Emeryville. Subsequently I had a flight in 1917 at Santa Monica. I had some training at North Island in 1925, and I received my basic training at Pensacola, Florida, in 1928.

The Court: I used to be a patron of Shellmound Park. What occurred at that time with relation to aviation?

The Witness: In 1911—I believe it was '11—

The Court: What happened there?

The Witness: In 1911 at Shellmound Park?

The Court: Yes.

The Witness: They had several aircraft driven by small-type engines with bicycle chains going out to the wooden propellers, and I don't recall of any one clearing the fence; they were taking off inside of that racetrack, if I recall correctly.

(Testimony of George M. Dixon.)

The Court: That is the only reason I asked. Thank you. Proceed.

Mr. Dyer: Stipulated he has great experience.

The Court: Those were the good old days. It is hard for [332] you young fellows to understand them.

Mr. Thomson: Q. Have you a present commission in the United States Navy?

A. I am a Captain in the United States Naval Reserve and Commanding Officer of Wing No. 87 located on the Oakland Airport.

Q. About how many hours of flying have you experienced?

A. Approximately 6,000 in multi and single-engine land planes and sea planes.

Q. Have you a license as an aviator of this State?

A. I am a designated naval aviator as of this date classified 1315. [333]

Q. Now, during World War II did you have any experience in the United States Navy?

A. Yes, sir. I was ordered into the Navy on December 2nd, 1940, and I was released on February 28, 1946. During that period I was the flight instructor, Public Works Officer when they built the Naval Station at Oakland, Livermore; Superintendent of Aviation Training, where I lectured on several subjects. I was then Executive Officer of the Naval Station at Leyte. Commanding Officer of the Naval Air Station at Newfoundland.

Q. During these times that you have described

(Testimony of George M. Dixon.)

did you have anything to do with construction work?

A. Yes. During the construction of the hangars and facilities at the Naval Air Station in Oakland I was Public Works Officer. When we constructed the base in Livermore I was the Officer in Charge.

Q. Did you have any duty in the South Pacific with reference to construction?

A. In the South Pacific I was Officer in Charge of Logistics on the staff of Admiral Frank Wagner. It was our responsibility to develop bases, assign aircraft, materiel and personnel to various fleet units.

Q. Have you had any business experience?

A. I was with the Tidewater Associated Oil Company from [334] 1929 up until the time I went to the City and County of San Francisco on April 3rd, 1950, other than my tour in the Navy during World War II.

Q. What were your duties with the Tidewater Associated Oil Company?

A. I started out as a salesman in Oakland. I later became their Chief Pilot, flying on the Pacific Coast as far back as Chicago at times. I was then made sales agent or manager of the Oakland Division. I was then made sales agent or manager of the San Francisco Division.

Q. Well, in what field were those sales agencies?

A. Well, I was responsible for the sales of petroleum products, delivery of petroleum products, in the East Bay Area, which went from Hayward to Pinole, and to the lower level tunnel. It was neces-

(Testimony of George M. Dixon.)

sary to lecture occasionally on petroleum products. I had considerable work with Hall Scott Motors as to the application of petroleum products, petroleum product periods, and internal combustion engines.

Q. Did you have anything to do with the sale of aviation fuel while with the Tidewater Associated Oil Company?

A. Yes, I did. I had—— At one time as Manager of the Aviation Department I contacted airports throughout the Pacific Coast selling aviation products, including gasoline.

Q. Mr. Dixon, have you studied further development of the San Francisco Airport? [335]

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial what the projected plans of the San Francisco Airport may be. Certainly that can have no bearing on the issues in this case.

Mr. Thomson: As I suggested to your Honor, I think I am speaking accurately when I say to your Honor that you are not only concerned with the past, you are concerned with the future. And I am going to demonstrate through this witness that these problems with reference to development of the Airport that have already been partially solved still remain as problems, and that the TWA is before your Honor claiming that throughout the future life of this lease nothing will be done or nothing should be done except imposition of ridiculous and absurd charges of \$4.25 for take-offs, an item of that sort that has already come into evidence.

(Testimony of George M. Dixon.)

I think it is quite important in order that your Honor have a full picture that we prognosticate as far as *we able* as to the future.

Mr. Dyer: Your Honor, I don't wish to engage in argument with counsel at this time. Certainly I would take issue with him, if this were the time for argument, that these charges are ridiculous and absurd charges.

Be that as it may, we are here in judicial proceeding presenting certain issues to the Court. The Court, I believe, [336] is concerned with what has occurred in the past. It will make its determination on the record in this case, from the facts that have occurred thus far.

I don't believe anything that the Airport proposes to do in the future should be binding on TWA or should be considered by this Court. I think we have the facts before us. It is perfectly competent to testify to pertinent facts as they have occurred, but I don't believe predictions should be considered in this case.

The Court: Matter submitted?

Mr. Dyer: Yes.

Mr. Thomson: Yes, your Honor.

The Court: The objection will be overruled. I will allow the testimony, subject to your motion to strike and over your objection.

Mr. Thomson: Q. Have you the question in mind, Mr. Dixon? A. I believe so.

Mr. Dyer: If the Court please, I would like the record to show I object to this question on the

(Testimony of George M. Dixon.)

ground that it is incompetent, irrelevant and immaterial. I am not sure I have made that objection at the time of the argument.

The Court: Let the record so show. Do you wish the question read?

The Witness: I believe I recall the question.

The Court: Very well.

A. During the past several years, why, it has become necessary to study the flight pattern of aircraft as the flight pattern pertains to operations in and out of any airport, particularly after the several fatal accidents they had in the East.

There is a national board that was established just recently by all of the major airlines, headed by former Admiral Rosendahl, that is making a study of the air pattern throughout the United States.

We desire to have an air pattern at the San Francisco International Airport that will cause aircraft to land, approaching over Bay water, avoiding congested areas where you have homes or congregations of people. And on the take-off we desire to have a flight pattern that will cause aircraft to avoid going over homes, populated areas and congested areas.

Based on the trend in aviation as a result of the development and research carried on in the past with reference to developing horsepower engines, they seem to be developing heavier, larger and faster aircraft. When you have aircraft with heavier weights, they are increasing the wing loading of the airplanes, it becomes necessary to adjust

(Testimony of George M. Dixon.)

your pattern accordingly. Wing loading has increased considerably during the past. [338]

We realize that the trend in aviation, jet aircraft, and so forth—we have been approached on that subject—in order to protect the future, protect our interests, we now feel we should acquire on purchase properties into the Bay waters further than where we own at the present time. That is, on easterly and southeasterly.

At the present time we own some approximately 3600 acres. We have around 2200 acres above water. We contemplate purchasing another six or seven hundred acres so we can protect that flight pattern. If it becomes necessary though the development of aircraft of larger and heavier types, we then will have the property where we can expand in an easterly or a southerly direction, which will effect safe and economical operations.

I say economical operations because aircraft are very expensive to operate. The Super-Con you are speaking about costs about \$1,700,000 for one airplane. We base the operating cost of aircraft on hours in the air, from block to block. They are quite expensive to operate.

Mr. Dyer: If Your Honor please, I will move to strike that answer concerning the cost to the airline to operate planes. I do not believe it is responsive, and I do not believe it is relevant to the issues in this case.

The Court: I will allow the record to stand. I

(Testimony of George M. Dixon.)

am learning something about aviation every minute here. All right. [339]

A. We have taken the stand that by having the proper type of runway, meaning of sufficient length, width and load-bearing characteristics, it offers safety from the standpoint of operations. And by having dual runways, it will effect economy because aircraft are not delayed on approach at the airport or not delayed materially when they take off.

We have in mind possibly one of the greatest airports in the world. So I say that the future of aircraft design will determine what we are to do. At the present time we are endeavoring to purchase property out in the Bay areas, in addition to what we now own, to protect our interests, and to have an airport which is the gateway to the Pacific.

The San Francisco Airport is approximately a little over one hundred miles closer to Honolulu than Los Angeles or Seattle. That is 200 miles round trip. So we will always be strategic-wise a very important airport. Military-wise we will be very important.

Mr. Thomson: Q. Mr. Dixon, has any consideration been given by you to the future installation of jet planes by aircraft companies?

A. Yes.

Mr. Dyer: I object to this, if Your Honor please. There isn't any foundation laid to show that that question is at all relevant to TWA. I think it is entirely irrelevant.

Mr. Thomson: Counsel could have made the same

(Testimony of George M. Dixon.)

objection [340] years ago with reference to the Constellation, I suppose.

Mr. Dyer: Whatever the argument may be, Your Honor, I will submit the objection.

The Court: Well, it may be helpful, after all. Did you gentlemen indicate to the Judge as to how long this case would take? Did you go on the record as to the time?

Mr. Dyer: Four days, as I recall.

The Court: Are we within that period?

Mr. Dyer: Yes, I believe we have one more day under the schedule.

The Court: I will allow it. Objection is overruled. Proceed.

A. About a year and a half ago a Sir Leonard Isatt—I-s-a-t-t—I believe that is the name—representing BCPA (British Commonwealth Pacific Airways) from New Zealand spoke to me in my office and indicated——

Mr. Dyer: Just a moment. If Your Honor please, I object to this testimony on the ground that it is hearsay.

Mr. Thomson: Q. Just describe in a general way, Mr. Dixon, without referring to the particular people you talked to.

The Court: You see, any conversation you had at that time, there were none of these people represented and they are not bound by any conversation you had there. A. I see. [341]

Mr. Thomson: Q. Just tell us, if you will, Mr. Dixon, in a general way what consideration you

(Testimony of George M. Dixon.)

have given to the jet plane problem, without reference to any conversations you might have had.

A. Oh, I see. Well, I can't very well explain my thinking unless I refer to the conversation I had with the individual concerned with our jet aircraft.

Mr. Dyer: If Your Honor please, I will object to any evidence or any knowledge of this man based on conversations with somebody else.

Mr. Thomson: Q. Well, if you can't answer——

A. (Interposing) Well, I will answer it this way——

Mr. Dyer: (interposing) Further object on the ground it is an opinion and conclusion.

The Court: Give him an opportunity.

A. This particular airline through BCPA have purchased jet aircraft.

Mr. Dyer: Your Honor please, I move to strike all this on the ground that it is entirely irrelevant, not binding on TWA.

Mr. Thomson: I will withdraw the question and put another question.

Mr. Thomson: Q. Have you in a general way considered the problems created by the advent of jet planes?

A. Yes, based on the knowledge that we have gained to date, [342] it appears that some day in the future we will have jet aircraft.

Q. What would be required in the way of additional facilities in the event of the operation of jet planes by commercial aircraft?

Mr. Dyer: I object to that upon the ground that

(Testimony of George M. Dixon.)

no foundation has been laid to show that this refers to any operation by TWA now or in the future.

Mr. Thomson: I will withdraw the question.

Mr. Thomson: Q. Do you consider there is a possibility that airlines in the future will ultimately adopt the use of jet planes?

Mr. Dyer: I object to that on the ground it calls for an opinion and conclusion, and by the very form of the question calls for a speculative answer.

Mr. Thomson: Why can't we have an opinion and conclusion from an expert witness?

Mr. Dyer: That is pure speculation.

Mr. Thomson: Well, I think all experts speculate to some extent.

The Court: In the interest of time I will allow him to answer the question so we can go on.

A. Why, the Boeing factory in Seattle and the Douglas factory in Los Angeles are both constructing jet aircraft which they expect to be used by airlines. [343]

Mr. Thomson: Q. And what are the problems created at an airport in the event of the installation of jet planes?

Mr. Dyer: Your Honor please, I do not wish to be captious, and I do not wish to delay these proceedings. May it be deemed I am objecting to these questions on the ground that they are calling for opinion and conclusion on a matter of hearsay?

The Court: Well, they are in the realm of speculation, but with the hope that this is the last question I will allow the answer.

(Testimony of George M. Dixon.)

A. Well, actually there probably will be many problems that we will be required to solve. Apparently there is a terrific noise given off by jet aircraft. There are certain problems that we or the Government do not have the answer on concerning the type of pavement or the damage that is caused by jet aircraft operating on runways or taxi-ways.

The Court: That is the reason it is speculative. We are wasting our time.

Mr. Thomson: Yes, Your Honor. I will go to another subject.

Mr. Thomson: Q. Mr. Dixon, will you tell His Honor of the problems involved in the increased weights of aircraft from the standpoint of the manufacturer?

Mr. Dyer: Just a moment. I will object to that. There isn't any evidence that that should be binding on TWA. TWA [344] doesn't manufacture airplanes. There is no showing that is the fact.

Mr. Thomson: This will have a bearing, Your Honor, upon the question as to whether or not the advent of the heavy planes should be anticipated. I will demonstrate by this witness that it is necessary that inventions should have been made in the way of lighter materials, that inventions should have been made of new type of engines developing very high horsepower unknown before; that invention had to be made in new types of fuel by which these planes could be operated. They were all related problems, and if those problems as a whole had not been solved we would not have even today

(Testimony of George M. Dixon.)

planes of 100,000 pounds. I think it has bearing upon the subject.

Mr. Dyer: Your Honor, that is not binding on TWA. We are not in the airplane manufacturing business. Moreover, if we go into these many collateral questions——

The Court: For the limited purpose, counsel indicated, I will allow the testimony.

Mr. Thomson: Will you read the question, please, Mr. Reporter, with the Court's permission?

Mr. Dyer: May the record show I am objecting to it on the ground that it is incompetent, irrelevant and immaterial?

The Court: Yes, let the record so show. [345]

(Thereupon the Reporter read: "Question: Mr. Dixon, will you tell His Honor of the problems involved in the increased weights of aircraft from the standpoint of the manufacturer?")

A. The airplane designers determine the available horsepower available; the aircraft is then designed around the horsepower. During the past 20, 25 years, the engines have come from the Wright J-5, which is around 225 horsepower, to the Wright engine which is 3,000 horsepower or better. The 28 Cylinder Ross was over 3,000 horsepower.

That has happened over the years, as the result of the research and engineering developed by the oil companies developing gasolines with higher octane fuels that would burn smoothly in a combustion chamber.

During that period the metallurgists have devel-

(Testimony of George M. Dixon.)

oped various types of metal that stood these temperatures and pressures, and it has been possible to develop highpowered engines today and to develop the propellers which must carry that particular load.

The result of the power plant we have today has been something that was not anticipated 10, 15 years ago. As I said, we are from——

Mr. Dyer: (interposing) Just a moment. I move to strike that statement on the ground that it is voluntary and is purely an opinion and conclusion as to what was or was not [346] anticipated.

Mr. Thomson: An expert witness, if Your Honor please, is entitled to testify to his opinion and conclusion.

Mr. Dyer: I don't believe this witness has been qualified as an expert in manufacture of airplanes. He has been qualified as a man with a lot of experience in the operation of planes.

The Court: I think it goes to the weight of the testimony and I will allow it over your objection. Proceed.

Mr. Thomson: Mr. Reporter, will you read back a few words so that the witness can pick up the context?

(Thereupon the Reporter read: "The result of the power plant we have today has been something that was not anticipated 10, 15 years ago. As I said we are from——")

A. Well, through the stimulus of the inventive genius of man and attainments of mechanical agen-

(Testimony of George M. Dixon.)

cies, they made it possible to come out with engines of horsepower ratings over the past 25 years from 225 to as high as 3200, I believe, on the Wright Compound, and up as high as 3100 for one engine. That has made it possible for the designer to build heavier, larger and faster aircraft.

Mr. Thomson: You may take the witness.

The Court: It is now 4 o'clock. Probably you want to go back and make some preparation, and we will save time by adjourning now, or do you wish to conclude with this witness? [347]

Mr. Dyer: I believe we will save time, considerable time, if we conclude it now for today.

The Court: Proceed, if you wish.

Mr. Dyer: No, I said I believe we will save time if we will conclude for the day at this time.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m. Friday, September 11, 1953.) [348]

The Clerk: Trans World Airlines, Incorporated vs. City and County of San Francisco, further trial.

GEORGE M. DIXON

called as a witness on behalf of the defendants. resumed the stand, previously sworn.

Mr. Dyer: If the Court please, I have no questions to put to Mr. Dixon.

Mr. Thomson: I beg your pardon?

(Testimony of George M. Dixon.)

Mr. Dyer: I have no questions to put to Mr. Dixon.

Mr. Thomson: That is all. Mr. Dixon, will you step down, please.

(Witness excused.)

Mr. Thomson: Mr. Messersmith.

HAROLD MESSERSMITH

was recalled as a witness on behalf of the defendants, resumed the witness stand, previously sworn.

The Clerk: Harold Messersmith to the stand, heretofore sworn.

Direct Examination

Mr. Thomson: Q. Mr. Messersmith, you were asked by Mr. Dyer as to whether or not the bidding was by way of competitive [349] bid in the transaction of October 1942 as to TWA. I want to ask you further in that connection what the element of competition in the bid was?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial. The fact is there were bids and that was the legal procedure called for by the City.

Mr. Thomson: I think this is in response to counsel's interrogation on that subject. It is rather deceptive if you simply stop with the statement that it was a competitive bid. I will demonstrate by this witness——

The Court: You may develop the facts, whatever they are. The objection will be overruled.

(Testimony of Harold Messersmith.)

Mr. Thomson: Q. Will you state what the element of competition was in the bidding?

A. The biddable item was Hangar No. 4. That is a hangar that cost approximately \$50,000. The City had the hangar constructed with its funds.

Q. And the bidding was limited to occupancy of Hangar No. 4? A. Yes.

Q. Were these various provisions incorporated in this document for common use facilities involved in the bidding? A. No.

Mr. Thomson: You may take the witness. [350]

Cross Examination

Mr. Dyer: Q. The City did call for bids for that property, did it not?

A. Yes, for the exclusive use of Hangar No. 4.

Q. And it advertised for those bids, did it not?

A. Yes.

The Court: Pardon me; what is the question?

Mr. Dyer: And it advertised for those bids, did it not? A. Yes.

Mr. Dyer: Q. Similarly, had it advertised for bids in the other leases executed about that time with airlines?

A. One other lease at that time—about that time.

Q. Now, Mr. Messersmith, I am going to show you this document attached to the lease of October 1, 1942, which is a resolution of the Board of Supervisors of the City and County of San Francisco approved November 3, 1942 and entitled "Res-

(Testimony of Harold Messersmith.)

olution confirming lease of certain property at the San Francisco Airport to Trans Continental & Western Air, Resolution No. 2966." Would you please read the "whereas" paragraph of that resolution?

A. "Whereas, pursuant to Ordinance No. 1736, Series of 1939, the Director of Property advertised in the official newspaper that bids or offers would be received by him on September 4, 1942, for leasing certain city-owned land at the San Francisco [351] Airport together with certain airport privileges and facilities. Said land is situated in the County of San Mateo, State of California, and is more particularly described as follows:"

Now the description is quite lengthy and it refers exclusively to the Hangar No. 4 which I just mentioned.

Q. That refers to land and facilities, does it not? Have you finished with it?

A. It states "for leasing certain city-owned land at the San Francisco Airport comma together with certain airport privileges and facilities."

Q. Yes. And that was the resolution of the Board of Directors confirming the 1942 lease?

Mr. Thomson: You mean the Board of Supervisors.

Mr. Dyer: Board of Supervisors; pardon me, we are dealing with a municipal corporation.

If the Court please, Mr. Thomson has agreed to stipulate to the validity of a photostatic copy of an advertisement for bids for the leasing of certain

(Testimony of Harold Messersmith.)

lands at the San Francisco Airport with reference to this lease. I have before me this photostatic document which is entitled "Authorizing Director of Property to solicit bids for leasing of certain lands at the San Francisco Airport, San Mateo County, No. 775, Ordinance No. blank, Series of 1939."

I wish to read into the record this sentence which [352] appears in the advertisement:

"Together with the rights and privileges of using the facilities of the San Francisco Airport for the operation of aircraft."

Mr. Thomson: Is there a reference in the call for bids "pursuant to the terms of a certain lease"? That has been our practice.

Mr. Dyer: This is a document which is attached to a letter received from the office of the Controller of the City and County of San Francisco and directed to Mr. John O'Toole, City Attorney, dated December 3, 1940.

Mr. Thomson: I didn't ask you that; pardon me.

Mr. Dyer: I was getting to that.

Mr. Thomson: It has been the usual practice in the call for bids to refer to a certain proposed lease available for inspection by the respective bidders.

Mr. Dyer: Your Honor, I think I should state at this time that I do not wish to mislead the Court. I was under the impression that this advertisement that I was referring to referred to the TWA lease. I see here that this is a reference to the United

(Testimony of Harold Messersmith.)

Air Lines lease; but that is only the last quotation I read to the Court, and the quotation that I first read there was from the resolution that also refers specifically to the TWA.

Mr. Thomson: Let's start in again on this TWA lease. [353] Do you want to offer the resolution of the Board of Supervisors?

Mr. Dyer: I will offer the resolution of the Board of Supervisors in evidence, sir. It is attached to the lease which is attached as a document as an exhibit to our complaint.

Mr. Thomson: It is part of the exhibit to the complaint, yes.

Mr. Dyer: May it be deemed admitted, counsel?

Mr. Thomson: That is correct; I will so stipulate; it may be deemed admitted in evidence.

Mr. Dyer: Q. It is correct, is it not, Mr. Messersmith, that in the lease with reference to the United that there was a specific advertisement for the leasing of land and facilities, isn't that so, to the best of your knowledge and recollection?

Mr. Thomson: This relates now to what the call for bids says.

Mr. Dyer: All right.

Mr. Thomson: Have you the call for bids on the TWA lease?

Mr. Dyer: I am quite certain, Mr. Thomson, that the call for bids is contained in the TWA files. I do not have it in court.

Mr. Thomson: I wonder if, subject to future correction, you could for the time being stipulate

(Testimony of Harold Messersmith.)

that the call for bids [354] for the lease that ultimately was awarded to TWA contained a reference to a proposed lease? That has been our practice. I surmise, subject to correction, that there was a reference in the call for bids to a proposed lease. I think we could enter into that stipulation now and check the records and correct it if necessary at a later time.

Mr. Dyer: I can't stipulate, Mr. Thomson, because I do not recall examining that document. I have no present recollection whatever.

Mr. Thomson: If this trial continues much further I may have the opportunity to get the Director of Property Available and get the copy of the call for bids.

The Court: Q. Are you familiar with the lease they were discussing? A. Yes, I am.

Q. Are you prepared to say what the language is, if you know?

Mr. Thomson: His Honor refers, Mr. Messersmith, to what I just mentioned: the calls for bids.

The Court: Q. The call for bids.

A. To my recollection the biddable item was the amount to be paid on the hangar premises.

Mr. Thomson: Q. To your best recollection did the call for bids so indicate?

A. To my recollection it did.

Mr. Dyer: Q. And the resolution of the Board of [355] Supervisors confirming the lease and authorizing the lease specifically referred to the facilities as read by you, is that correct?

(Testimony of Harold Messersmith.)

A. Yes, it included the schedule of rates that were in effect at that time.

Mr. Thomson: Q. Is it your recollection, Mr. Messersmith, that a lease was in the first instance prepared and that the call for bids upon this proposed lease, already prepared, mentioned the proposed lease, and the proposed lease as drawn, before any bids were received, enumerated these various items and charges for common use facilities?

A. Yes.

Mr. Thomson: I think that is sufficient.

Mr. Dyer: Yes; I am content to stand on the resolution of the Board.

Mr. Thomson: I am content to stand on this call for bids and the language for leasing property.

Q. The biddable item solely was the rental for the hangar space; that was all that was bid on?

A. Yes.

The Court: I think it is important. If there is any question about it, you had better clear it up.

Mr. Dyer: I can say this, Your Honor: That I have initiated an attempt to discover that document, the cost of bids, and if I receive it, I will make such information as may be there available to the Court.

Mr. Thomson: I will send over for it now, Your Honor, if we may have some time.

The Court: Very well.

Mr. Thomson: That is all I have, Mr. Messersmith. Have you finished with your cross examination?

Mr. Dyer: Yes.

(Testimony of Harold Messersmith.)

Mr. Thomson: That is all, Mr. Messersmith.

(Witness excused.)

The defendants and cross-complainants rest, if Your Honor please.

The Defendants Rested.

Mr. Dyer: I will call Mr. Andrews.

HENRY G. ANDREWS

called as a witness for the plaintiff and cross-defendant in rebuttal, previously sworn.

The Clerk: Henry G. Andrews to the stand; heretofore sworn.

The Court: You have already been sworn.

Mr. Thomson: If the Court please, for the purpose of [357] simplification of the record, I move to strike the testimony relating to the United lease that counsel inadvertently presented.

The Court: It may go out.

Direct Examination

Mr. Dyer: If the Court please, at page 186 of the record, the Public Utilities Annual Report, that is the report of the San Francisco Public Utilities Commission, for the fiscal year 1936-1937 was identified by Mr. Messersmith. At this time I should like that document to be identified, marked for identification, and the portion thereof extending from page 155 to page 182 be received in evidence.

Mr. Thomson: Are you waiting for me to say something?

(Testimony of Henry G. Andrews.)

The Court: He is offering this in evidence and I do not know what it is.

Mr. Thomson: May I see it briefly?

Mr. Dyer: It is the '36-'37 report of the Public Utilities Commission.

Mr. Thomson: This was previously marked for identification. You have made your offer. I have no comment. I never stipulate to anything going into evidence; it isn't my practice.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 19 marked for identification,— [358]

The Court: So the record is clear on this in the transcript, summarize that and in some way identify it.

Mr. Dyer: Yes, sir. On page 186 of the transcript when Mr. Messersmith was on the stand under cross examination, I put to him questions concerning his contemplation of the nature of the weight of planes that would come into use thereafter, and at that time I showed to him a picture of a prototype 4-engined plane with the markings "TWA" on the wing and asked him to identify it, and he said it was a plane that was contemplated to carry, I believe, 33 passengers, and various testimony appears in that regard at that point, about page 186, concerning this exhibit.

The Clerk: And Plaintiff's Exhibit 20 admitted and filed in evidence.

(Testimony of Henry G. Andrews.)

(Thereupon Report for fiscal year 1936-1937 referred to above was marked Plaintiff's Exhibit No. 19 for identification only.)

(Thereupon chapter of report referred to above was marked Plaintiff's Exhibit No. 20 and admitted into evidence.)

Mr. Dyer: Q. Mr. Andrews, with reference to the subject of the weight of planes, have you had occasion to follow during your connection with the air carriers the weight of planes that were coming into use in the aviation business?

A. Yes, sir.

Q. You testified on direct that you were the chief [359] negotiator of the 1942 lease for TWA and that for a period of some time prior to October 1, 1942, you had various discussions with Mr. Doolin, the manager of the Airport?

A. Yes, sir.

Q. Did any of those discussions concern the weight of planes?

A. Most of them discussed the weight of planes in one form or another.

Q. And approximately when did these discussions take place?

A. Well, they were had at various times, from, oh, say the early part of 1938 to the time of the conclusion of the contract.

Q. In 1942? A. 1942.

Q. What type and weights of planes were discussed with Mr. Doolin during that period?

A. We discussed the ones that were then in use.

(Testimony of Henry G. Andrews.)

and those that were in course of construction and their use was a certainty in the very near future, and the prospects of those that would come into use in the course of years to come.

Q. Specifically what weights were mentioned?

A. The basic weights of planes then in use, or rather the general weight, was around 25,200 pounds, which applied to the DC-3; and the Boeing 307 was in course of construction, and which we hoped to put in service within a very short time, had a gross weight of 54,000 pounds. Then the DC-4, which [360] was then being constructed and in its experimental stage, we did have the exact figures on the weights of it, but we surmised they would be 60,000 pounds and better. It afterwards turned out to be 71,800 pounds. We estimated with the growth of planes from the past history up to the time that this lease would terminate in 20 years' time, that they would be in excess of 200,000 pounds or more.

Q. Mr. Andrews, there has been a great deal of discussion concerning the Boeing Stratoliner which was put in use in April of 1945. I show you this picture. What does it purport to represent?

A. That is the Boeing Stratoliner as we named it.

Q. That is the plane we have been talking about?

A. The Boeing 307, to be more exact in the model number.

The Court: That is 1945?

A. Yes, sir.

The Court: What is the weight of that plane?

(Testimony of Henry G. Andrews.)

A. The plane is 54,000 pounds as used in commercial service. It exceeded that in military service.

Mr. Dyer: May this be marked and received in evidence?

The Court: Let it be admitted in evidence.

The Clerk: Plaintiff's Exhibit 21 admitted and filed in evidence.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 21 and admitted into evidence.) [361]

The Court: Q. Is that a passenger plane?

A. Yes, sir.

Q. It carried freight as well?

A. Not to any great extent. They were for freight planes during the war. The Army took them over from us at the start of the war and they were used to ferry personnel over there. It was one of those that carried President Roosevelt across the ocean on his first trip over there.

Mr. Dyer: Q. Mr. Andrews, did you discuss that plane with Mr. Doolin prior to the time the lease was executed?

A. You are referring to the Boeing 307?

Q. I am referring to the Boeing Stratoliner; I am entirely unfamiliar with the Boeing number.

A. Yes, sir, that was very thoroughly discussed, and I am sure Mr. Doolin had a ride in it prior to the execution of the lease.

Mr. Thomson: What was that? I didn't hear.

A. I said, it was very thoroughly discussed and

(Testimony of Henry G. Andrews.)

I am sure Mr. Doolin had a ride in the plane prior to the execution of the lease.

Mr. Dyer: Q. Where were the Boeing Stratoliners manufactured, Mr. Andrews?

A. In Seattle.

Q. Do you have any recollection of when the first Boeing Stratoliner landed at the San Francisco Airport? [362]

A. In the first months of 1940.

Q. In other words, the Boeing Stratoliner landed at the San Francisco Airport at least two years before the execution of the lease; is that correct? A. Yes, sir.

Q. How many landed at the San Francisco Airport about that time?

A. There was six of those planes ferried from Seattle to San Francisco for use by TWA. The first one that was ferried down was stopped for short flights for TWA personnel and a few of the Airport employees. Then on several occasions after that within the year 1940 they were brought here for publicity flights carrying various City and Chamber of Commerce officials.

Q. We will return to that, Mr. Andrews.

Did you have anything to do with piloting a Boeing Stratoliner into San Francisco?

A. Yes, sir.

Q. When?

A. That was on June 6th, 1940.

Q. Mr. Andrews, how are you able to so precisely fix that date?

(Testimony of Henry G. Andrews.)

A. With my pilot's logbook.

Q. Will you produce that document?

A. Yes, sir. This is the entry referred to (indicating). [363]

Q. I hand you this document that you have referred to, Mr. Andrews. Will you please explain its content to His Honor and what it purports to show?

A. Each licensed pilot is required to keep a record, a log, of his actual flying time, and it must be certified to and presented for renewal of licenses. This is the log which I kept at that time which covers the period from—outside of the summary at the start—from October, 1934, to December, 1940. The entries show the date of a flight, the type of plane and license number or some identification; the number of engines, kind of engines, where from and where to, and the amount of time consumed on the flight.

Q. Mr. Andrews, you referred to the fact that you piloted a Boeing Stratoliner into the San Francisco Airport on June 6th, 1940. Would you state to His Honor the entries that you have in that Logbook before you concerning that flight and that landing at San Francisco?

A. This book shows that on the 6th of June, 1940, type of plane Boeing 307, NC No. 19909, having four cyclone engines, was flown from Seattle to San Francisco, consumed time: 4 hours and 6 minutes.

The Court: What is the time now?

A. Four hours six minutes.

(Testimony of Henry G. Andrews.)

Mr. Dyer: I will ask that this document be marked for identification and I will also offer it in evidence. [364]

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 22 admitted and filed in evidence.

(Thereupon pilot's logbook referred to above was marked Plaintiff's Exhibit No. 22 and admitted into evidence.)

Mr. Dyer: Q. Mr. Andrews, as I recall, you mentioned Boeing Stratoliners after they passed through San Francisco were brought back here for sightseeing and publicity purposes?

A. Yes, sir.

Q. How many were brought back for that purpose?

A. I have a distinct recollection of twice.

Q. Of two?

A. Of two of them that were brought back on different dates.

Q. On how many days?

A. On two different dates, I have a distinct recollection.

Q. Can you state what year that was to the best of your recollection?

A. It was in 1940.

Q. Will you describe what use was made of the Stratoliners when they landed at San Francisco?—at that time?

A. They took various personalities from the City, Chamber of Commerce, City officials and so

(Testimony of Henry G. Andrews.)

forth for short rides over the Bay Area, taking off and landing from the Airport, probably a dozen such flights on each occasion.

Q. Did you participate in any of those flights?

A. Only from a supervisory capacity in the operation of the flights. I can recall the captains of those two flights if you so desire.

Q. Do you recall the names of the captain?

A. Captain Morehouse and Captain Bryant.

Q. When did the Stratoliners first go into commercial service for TWA? A. In 1940.

Q. Two years before the lease?

A. Yes, sir.

Q. Did you discuss that fact at all with Mr. Doolin? A. Quite frequently.

Q. What was the substance of those conversations?

A. I was asked by him as to when I would permit, how many, and so on, San Francisco to have that service.

Q. Anything else said about that subject?

A. Well, about the desirability of having them fly into San Francisco and that he would like to see the Airport have such service.

Q. With reference to the subject of weight of planes, did you ever discuss the escalation clause in the lease with Mr. Doolin?

A. That was a very thoroughly discussed clause.

Q. What was the subject of those discussions with reference to the weight of planes? [366]

A. I was a little scotch, probably, in the first

(Testimony of Henry G. Andrews.)

negotiations, but I wanted a flat rate per landing regardless of size.

Mr. Thomson: I think, counsel, what the witness is now testifying to is merely repetition of his first testimony. I take it that what you are seeking to elicit from this witness now is some special discussion with reference to weights of planes only. Your question indicated that.

Mr. Dyer: Yes, it was so worded.

Mr. Thomson: The witness is doing nothing now but reiterating his testimony on direct examination.

Mr. Dyer: I don't believe so, sir.

Mr. Thomson: That is all he is talking about at this time.

Mr. Dyer: This is going to the subject of the weight of planes. I thought this merely was preliminary.

Mr. Thomson: I ask that the witness be cautioned to respond to the question which involved the weight of planes. That is the only subject counsel was able to go into by way of rebuttal. This witness has already testified along the same line is now testifying; he is simply repeating his testimony on direct.

Mr. Dyer: May the witness proceed?

The Court: I think you went into it fully. However, I hope you conclude.

Mr. Dyer: Q. All right. You did discuss escalation with reference to weight of planes?

A. Yes, sir. [367]

Q. Now, with reference to the escalation clause

(Testimony of Henry G. Andrews.)

what if anything was said concerning the necessity of that clause to take care of the future weights of planes?

A. Will you make that question just a little bit clearer?

Q. Yes. What if anything was said by you or by Mr. Doolin concerning the necessity of that clause to take care of the contemplated weights of planes?

Mr. Thomson: If your Honor please, I want to renew my objection and reiterate my objection which I previously made during plaintiff's case in chief.

There appears to be a complete written contract between the parties, and your Honor made a ruling subject to motion to strike. I want my objection to be interposed that this violates the parol evidence rule. And will it be permitted by your Honor and understood by counsel that my objection goes to this whole line of testimony?

Mr. Dyer: Your Honor, one of the issues raised by the defendants in this case is that there was no contemplation in the minds of the parties that planes would ever exceed 25,000 gross take-off weight.

The Court: As a matter of law, I am limited to the contract itself, am I not?

Mr. Dyer: Not on this issue, sir.

The Court: I think so. So that I will divulge my state of mind now so that you may know it and take advantage of [368] it if you wish, so that your legal rights are protected.

(Testimony of Henry G. Andrews.)

Mr. Dyer: May I make an offer of proof on that sir?

The Court: You may.

Mr. Dyer: Mr. Andrews would testify in response to questions put to him and to which objection had been made that in 1942 he discussed the fact that Boeing Stratoliners were coming into commercial service; that Mr. Andrews wished that a flat rate for the use of planes be included.

The Court: So the record is clear, we had better have that clause that we are discussing, then.

Mr. Dyer: Yes, sir. I am referring specifically now to the paragraph included on page 6 of the lease of October 1, 1942, the last paragraph on that page.

The Court: Read it.

Mr. Dyer: Which states as follows:

“The foregoing fees shall apply to schedules that shall be flown by aircraft not exceeding 25,500 pounds of standard gross weight. With respect to any scheduled trip departure on which aircraft exceeding 25,500 standard gross weight are scheduled by the lessee to be operated, the monthly fee for that scheduled trip departure shall be increased by \$1.00 for each one thousand pounds of such excess weight. (500 pounds or any major part of one thousand pounds to be counted as [369] if a whole one thousand pounds, and any smaller part to be disregarded.) The excess payment is to be computed on the basis of one aircraft.”

This witness would testify that he discussed that

(Testimony of Henry G. Andrews.)

clause with Mr. Doolin, and that this witness, Mr. Andrews, representing TWA, wished a flat rate because he contemplated those planes coming into use; and that Mr. Doolin adverted to the fact that it was contemplated that heavier planes would come into commercial service, and that therefore he wished to put into the lease an escalation provision providing for an excess charge in the event those planes in excess of 25,500 pounds came into commercial service.

May I also state that this offer is made to meet and refute that portion of the answer of defendant appearing on paragraph 2, line 23, of the answer and cross-complaint, and extending to line 29, which states as follows:

“In this connection these defendants further allege that there was not on said date——” referring to October 1st, 1942, “——any conception in the minds of any officers or representatives of either of the parties to said document of purported lease that commercial aircraft would ever within the purported term of said purported lease exceed to any substantial extent said maximum permissible take-off weight.” [370]

The Court: Is that all from this witness?

Mr. Dyer: Sir?

The Court: Is that all from this witness?

Mr. Dyer: No, sir. Your Honor, I take it that the offer of proof was rejected?

The Court: I will sustain the objection.

Mr. Dyer: Q. Mr. Andrews, as I recall your

(Testimony of Henry G. Andrews.)

testimony you were at the San Francisco Airport until December of 1942, is that correct?

A. December 1942, yes, sir.

Q. Yes. Now, what types of military planes and of what weights used the Airport during the time of your tenure at the San Francisco Airport?

A. The actual weights under military status, I can only compare them with the commercial version of those types of planes.

The P-38 was a twin-engine pursuit type of plane which was in general use there by the Military. Also, I believe it was termed the P-51 pursuit plane. There were on several occasions the military version of the DC-4, which is a C-54, I believe, under their classification, landed at the Airport, discharged military personnel at the ramp.

Q. Approximately how heavy a plane was the C-54?

A. As we use it in commercial service, 71,800 pounds.

Q. From your knowledge of the—— [371]

Mr. Thomson: Could that be identified as to year?

Mr. Dyer: Yes.

Mr. Dyer: Q. Will you identify the use of the Airport by the C-54's as to year, Mr. Andrews?

A. 1942.

Q. Yes. From your knowledge of planes, as a general matter were the weights of military aircraft heavier or lighter than similar aircraft of the same type used by commercial airlines?

A. Heavier.

(Testimony of Henry G. Andrews.)

Q. What is the basis of your conclusion, sir?

A. The Military do not maintain the same safety standards that the commercial operator does, and they operate them in military service without the same safety precautions as to weight, performance, and so forth.

As an example of that, there are some military types of planes that will not meet the requirements for a commercial license.

Q. Now, Mr. Andrews, were there any structures or revetments put on the Airport during the time of your tenure there by the Military?

A. Yes.

Q. What is a revetment?

A. The ones that were placed there were an earthworks that were built up high enough in a sort of a "U" shape that [372] a plane could be placed within it to protect it against bombing in case of a bombing raid at the Airport.

Q. And when were those placed at the Airport by the Military?

A. Immediately after Pearl Harbor when the Military started moving planes into the Airport.

Q. And how many of them, approximately, were on the Airport?

A. To the best of my recollection, there were probably 20 or 30 of them.

The Court: I now have a mental picture of it myself. Pass along.

Mr. Dyer: Q. Where were these revetments located with reference to the taxi-ways and runways?

(Testimony of Henry G. Andrews.)

A. They were so dispersed that planes could have ready access to the runways, and in close proximity.

Q. During the time you were at the San Francisco Airport did you ever have any discussions with City employees there concerning revetments?

A. Yes, sir.

Mr. Thomson: I—— Well, go ahead.

Mr. Dyer: Q. With whom did you have those discussions?

A. I particularly recall discussions with a Mr. Werner who was, I believe, the Field engineer at the Airport.

Q. What did that discussion concern with reference to those revetments?

A. The weight of the revetments causing a pressure downward, [373] which caused the earth to press up under the runways and various other parts of the field, which was very destructive to it.

Q. And generally, for the record, when did these discussions take place?

A. Throughout the year 1942.

Q. Yes, sir. Now, Mr. Andrews, when did you first obtain knowledge that the Constellation was in production?

Mr. Thomson: I submit that is incompetent, irrelevant and immaterial, and would not be in any wise binding upon the City.

Mr. Dyer: Your Honor, the pleadings are very clear that the City alleges that there was no contemplation in the minds of the representatives of

(Testimony of Henry G. Andrews.)

any of the parties that heavy planes would come into use. This man was the chief representative of TWA at the time, and I wish to find out what his contemplation was in connection with that allegation of the City. I think it directly meets the issues in this case and directly meets the issue and the evidence which was adduced by the City.

The Court: Read the allegations.

Mr. Dyer: This again, sir, is paragraph 2 of the answer and cross-complaint, of defendant City, and others, and it appears on page 2 of the pleadings, from line 23 to line 29 and states as follows: [374]

"In this connection these defendants further allege that there was not on said date any conception in the minds of any officers or representatives of either of the parties of said document of purported lease that commercial aircraft would ever within the purported term of said purported lease exceed to any substantial extent said maximum permissible take-off weight."

The Court: "Take-off weight"? What does that mean?

Mr. Dyer: May I ask the witness that question, sir? He is much more competent than I am to reply to it.

The Court: What is that?

The Witness: Airplanes are built, when they get to a large category, where their stresses are such that the landing stress is greater than the take-off stress, so that in landing their weight is restricted. It is necessary for them to burn out a certain amount

(Testimony of Henry G. Andrews.)

of fuel or dispose of it by dump valves before landing so that they come down to what we call a standard gross weight.

By way of example, on the DC-3, which has been commonly spoken of during this case, it had a 24,800 pound landing weight, and the gross take-off weight was 25,200 pounds. In other words, they had to burn out that amount of fuel before they could land so that they wouldn't land at a weight in excess of that, but they could take-off with the [375] 25,200 pounds.

The Court: Would they burn it in the air?

The Witness: Either that or, if an emergency, they had dump valves to release that fuel to lower their weight for the landing.

Mr. Dyer: May I have the question read, please? Well, I think I can rephrase it and perhaps save some time.

Mr. Dyer: Q. When did you first know of the planning of the Constellation?

A. To the best of my recollection, it was about 1938 or 1939.

Q. During the course of your tenure at San Francisco Airport did you ever discuss the Constellation with Mr. Doolin?

A. Yes, a great many occasions.

Q. And were any of those discussions prior to the time of the execution of this lease?

A. Yes, some of them were, I believe.

Q. And what was the substance of those discussions with Mr. Doolin?

(Testimony of Henry G. Andrews.)

A. About the performance, the weight and competitive value of that type of aircraft.

Q. What if anything was said about the possibility that the Constellations might come into commercial use?

A. It was a foregone conclusion that it would.

Q. You say it was a foregone conclusion? What were the sources of your information concerning the existence of the Constellation?

A. At first it was what you might term company-restricted information to prevent competition at meetings of supervisory personnel in Kansas City. Afterwards, through various publications and, in addition to that, company bulletins that were sent out.

Q. You refer to various bulletins and publications that were sent out. I show you this document. What is it, Mr. Andrews?

Mr. Thomson: I will ask that the witness be instructed simply to identify the document.

A. It is a copy of a magazine which was in general circulation at that time.

The Court: What is the date on that? The date?

The Witness: May 15, 1941.

Mr. Thomson: I am going to object, your Honor, upon the same ground that I voiced to your Honor yesterday, that counsel cannot circumvent the rule by simply asking this witness to read from the document matters of any sort that would amount to presenting it in evidence.

I may say to your Honor I have a complete folder

(Testimony of Henry G. Andrews.)

of various other types of documents that are equally favorable to the City, and we could be here for weeks if this is going [377] to be a battle of pamphlets. This is simply identified by the witness, and I think that is as far as he can go.

Mr. Dyer: I haven't concluded yet, sir. I simply asked him what it was.

Mr. Thomson: I didn't object to that.

The Court: There is nothing before the Court.

Mr. Thomson: Yes. We will wait for the next question.

The Court: Very well.

Mr. Dyer: Q. Do you have any knowledge of how widely this publication entitled "American Aviation" was circulated among aviation people in 1941 and 1942? A. Yes, sir.

Mr. Thomson: I object to that as incompetent, irrelevant and immaterial, and I ask that the answer go out.

Mr. Dyer: I am laying a foundation, if your Honor please.

Mr. Thomson: I don't think the extent of the circulation makes any difference. The Examiner's Sunday Supplement could be identified as widely circulated, but it wouldn't change the rules of evidence.

Mr. Dyer: All right, I will change it.

Mr. Dyer: Q. Did you ever see a copy of this magazine, American Aviation, in Mr. Doolin's office, at the San Francisco Airport in 1941 or 1942?

(Testimony of Henry G. Andrews.)

Mr. Thomson: I object to the question as incompetent, irrelevant and immaterial. [378]

The Court: He may answer. Objection is overruled. Did you?

A. Yes, sir.

Mr. Dyer: Q. Did you have any knowledge of the existence of this document, American Aviation, in 1941?

A. Yes, sir. I have a subscription to it.

Q. What does this document refer to, Mr. Andrews?

Mr. Thomson: If your Honor please, I think that question is objectionable upon the grounds I have indicated.

The Court: I will sustain the objection. We would be here for considerable more time.

Mr. Dyer: Your Honor, may I make an offer of proof, briefly, on this, and may I indicate the purpose of the offer?

The Court: Proceed.

Mr. Thomson: I don't think this is a proper subject for an offer of proof.

Mr. Dyer: I believe it is. It goes directly to the issue that the representative of TWA and the representative of the airline had in mind contemplation——

The Court (interposing): In any event, you have a record of it.

Mr. Dyer: But not with reference to this precise subject of Constellations. We have a record to some extent, yes, sir, but I wish to complete that

(Testimony of Henry G. Andrews.)

record with reference [379] to this very precise notation concerning the indication of the existence of the Constellation.

Mr. Thomson: Your Honor please, I would then ask the privilege of bringing the Court a huge volume of periodicals upon which I will undertake to make offers of proof, which will probably occupy a couple of days at least.

The Court: You will now proceed, gentlemen, with this case.

Mr. Dyer: May I make the offer of proof, sir?

The Court: You may.

Mr. Dyer: This witness would testify that in 1941 he was a subscriber to the periodical entitled "American Aviation", and that he saw copies of this document in Mr. Doolin's office on various occasions in 1941 and 1942.

He would testify that he is familiar with the contents of this specific document, which is entitled "American Aviation," dated May 15, 1941; and that he was familiar with the facts stated therein, which state that on that date 80 Constellation planes had been purchased—had been purchased by TWA and by Pan American Airline, 40 each.

He would further testify that that document brought to his notice and the notice of Mr. Doolin the fact that those 80 planes were then, on that date, under construction at the Douglas Aircraft plant in Santa Monica, California, and that the first plane of that type was scheduled for test [380] flight later that year, referring to 1941.

(Testimony of Henry G. Andrews.)

The Court: Now, will you indicate the purpose of that offer?

Mr. Dyer: Yes, sir. The purpose of this offer is to show that on the date the lease was executed, and prior thereto, Mr. Doolin, as a representative of the City, and Mr. Andrews as a representative of TWA had in contemplation that planes in excess of 25,000 pounds gross take-off weight would during the course of that lease be put into commercial service.

The Court: Does that document indicate that?

Mr. Dyer: I believe it does, sir.

The Court: It doesn't appear as yet.

Mr. Dyer: I think that it shows that on that date 80 of them had been ordered by two of the major airlines which were serving San Francisco Airport.

The Court: What relation has that to weight?

Mr. Dyer: Your Honor, these planes are planes of 94,000 pounds gross take-off weight, and they are the heaviest——

The Court: This document you are trying to get into evidence doesn't indicate that, does it?

Mr. Dyer: Yes, it does.

The Court: Read that item.

Mr. Dyer: There is a sentence in the second page of this document which says, "Gross weight of the plane is [381] 37 tons." It also says, "Useful load is said to be 16½ tons or 33,000 pounds. Range of 5,000 miles. Would bring about revolutionary changes in air transportation, especially to points outside the U.S."

(Testimony of Henry G. Andrews.)

May I also point out to your Honor that the pleadings make specific reference to the Constellation, which is the subject matter of the document contained in this offer of proof. The pleadings state, sir, and agree that those planes are approximately 94,000 pounds. That is a correct statement, Mr. Thomson?

Mr. Thomson: That is mentioned in the cross-complaint.

The Court: Well, I think we had better get a record on it, then, if there is any question on it. Proceed.

Mr. Thomson: This will be subject to a motion to strike, your Honor.

The Court: It will go in subject to your motion to strike and over your objection.

Mr. Dyer: This offer of proof is also made——

The Court: Now, dispense with your offer of proof and make proof, if you have it, whatever it may be.

Mr. Dyer: Q. Were the Constellations used in military service at the time the lease was executed or prior thereto?

A. To the best of my recollection, they were not.

Q. When did they first come into use, into military service, to the best of your recollection? [382]

A. 1943.

Q. And when did they first come into commercial service?

A. Oh——

The Court: 1945, wasn't it?

A. I believe it was 1946, your Honor.

(Testimony of Henry G. Andrews.)

The Court: 1946? All right.

A. To the best of my recollection. It is a little dim on the exact year.

Mr. Dyer: Q. They were taken over by the Army, during the war, from TWA?

A. They were—— Well, yes, they were taken over by the Army.

Q. Did you have any knowledge of the existence and construction of 80 Constellation planes in 1941?

A. Yes, sir.

Q. And did you know where they were being constructed? A. Yes.

Q. Did you know approximately how heavy they would be? A. Yes, sir.

Q. What was the source of that information?

A. Publications that were—public publications, that is, those in general circulation, and company bulletins, and information received at supervisory meetings in Kansas City.

Q. And did you discuss that matter with Mr. Doolin from time to time? A. Yes, sir. [383]

Q. Specifically, the Constellation?

A. Yes, sir.

Q. Before 1942? A. Yes, sir.

Q. October 1, 1942? A. Yes, sir.

The Court: I don't know, counsel, maybe I made myself misunderstood. I am not excluding that document.

Mr. Dyer: Oh.

The Court: I indicated to you to dispense with

(Testimony of Henry G. Andrews.)

your offer of proof and present your proof for the record.

Mr. Dyer: I see, sir. Then at this time——

Mr. Thomson: Subject to the motion, your Honor?

The Court: Yes, subject to motion to strike and over your objection.

Mr. Dyer: Then at this time I will offer the document in evidence and ask it be identified and received in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 admitted and filed in evidence.

(Thereupon magazine entitled "American Aviation" dated May 15, 1941 was received into evidence and marked Plaintiff's Exhibit No. 23.)

Mr. Dyer: Q. During the period you were at the Airport from 1937 to 1947 were improvements going on? [384] A. Yes, sir.

Q. Were those improvements constant or intermittent, or how constant were they?

A. I would say they were continuous up to the time the Military took over and interrupted.

Q. During the time you discussed the lease with Mr. Doolin was any reference made to a 1942 schedule of rates and charges?

A. I never heard anything referred to as such.

Q. Did you know of the existence of a 1942 schedule of rates and charges at that time?

Mr. Thomson: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Henry G. Andrews.)

The Court: If he knows, he may answer. Objection overruled. Did you?

A. No, sir.

Mr. Dyer: Q. Now, in 1942, before the utilization of the Stratoliner, did you observe the condition of the parking areas in front of the hangars from time to time? A. Yes, sir.

Q. And what was the condition observed by you?

A. There were a great many cracks in them, and sinkholes where trucks had run over them, and various other sorts of disrepair which were temporarily repaired from time to time.

Mr. Thomson: I ask that the testimony, that part of [385] the answer of the witness which refers to trucks going over the places of these deteriorations go out as a conclusion.

The Court: It may go out.

Mr. Dyer: Q. What type of planes were using those parking areas at that time?

A. Well, almost all types that were in existence at that time, including the military planes that were brought there in the early part of 1942.

Q. Specifically, what type of military plane did you observe use those parking areas?

A. The greatest number were P-28's and P-51's, I believe.

Q. Did you ever observe any damage done to that area by those planes? A. Yes, sir.

Q. What was the nature of that damage, or what was the nature of the operation which did the damages observed by you?

(Testimony of Henry G. Andrews.)

A. One in particular was a P-38 plane that lost an engine and landed on the ramp and into the partition between hangars 3 and 4, damaging both the ramp and the hangars.

Q. Was there any type of operation of the P-38 in taxiing that would damage it, as observed by you? A. Yes, sir.

Q. Will you please describe that operation to his Honor?

A. Yes. By locking the wheel with their brake on the inner [386] arc of a circle when they started to taxi, which had a grinding effect on any surface which it was on, instead of allowing it to roll. It was probably done because of the extreme hurry in getting military craft out. Commercial craft don't do that.

Q. This was before the utilization of the Boeing Stratoliner? A. Yes, sir.

Q. And before the lease? A. Yes, sir.

Q. Did you ever discuss with Mr. Doolin before the lease was executed the plans that he had for extension of the airport facilities, including the ramps and runways? A. Yes, sir.

Q. Specifically, when were these discussions held with him?

A. Those were almost continuous discussions throughout the time I was at the field. Various occasions when I would visit with him in his office and had other business there to transact.

Q. What was the substance of those discussions?

A. As to the ultimate development, and his plans

(Testimony of Henry G. Andrews.)

toward the development of the Airport, which he kept on a drafting board in his office.

Q. Did he ever discuss with you the contemplated length of runways?

A. Yes, those were discussed and projected on these drawings. [387]

Q. What were the runways with reference to length which were discussed and which were projected on the drawings seen by you?

A. There was one projection extended out 12,000 feet that I recall, and another one which was in the distant future, as he stated, that extended almost to Coyote Point, and acquisition of the tideland property, I believe he called it, was blocked out with the various owners' names on it.

Q. Do you know, Mr. Andrews, whether an extension of a runway or construction of a new runway was commenced in 1942 or prior thereto?

A. There were new runway constructions during the time I was at the field. The exact amount of it, my recollection is a little dim.

Q. Do you have any recollection of the length of the runway which was planned or in contemplation by Mr. Doolin in 1942?

A. There was one in the neighborhood of 8,000 feet.

Q. Do you know to what extent that planning had reached, whether or not it was definitely planned or merely in the preliminary stages?

A. There were some thoroughly detailed drawings on this drafting table in his office which I saw.

(Testimony of Henry G. Andrews.)

The Court: We will take a recess.

(Short recess.) [388]

Mr. Dyer: I have no further questions to put to Mr. Andrews on redirect.

Recross Examination

Mr. Thomson: Q. Mr. Andrews, you testified that the Constellations were ordered from whom?

A. The Lockheed Aircraft Company.

Q. I don't believe you used the term Lockheed; you used some other name, I believe it was Douglas. Do you want to stand corrected?

A. I will stand corrected if I misstated.

Q. The different Constellations that were produced varied in weight, did they not?

A. How is that?

The Court: They varied in weight.

A. Oh, yes, sir.

Mr. Thomson: Q. In other words, I take it, there was a Constellation originally produced and that subsequent Constellations from time to time increased in weight? A. Yes, sir.

Q. And the variance was always in the form of an increase? A. Yes, sir.

Q. How many Constellations did TWA actually take delivery of?

Mr. Dyer: Will you fix the period, please, Mr. Thomson?

Mr. Thomson: Well, when they were delivered. The [389] witness testified to a certain number being under order, and he coupled Pan American,

(Testimony of Henry G. Andrews.)

I believe, with the order. I want to find out how many TWA actually took.

The Witness: May I correct counsel? I didn't testify to that.

Mr. Thomson: I beg your pardon.

The Witness: I beg your pardon; I didn't testify to the number ordered.

Mr. Thomson: You said there were certain——

The Witness: I believe that was in the document submitted.

Mr. Thomson: Q. You said there was a certain number in production. Was that your testimony?

A. No, sir; I didn't testify to the number of Constellations.

Mr. Dyer: Mr. Thomson, I think the document clearly shows that.

Mr. Thomson: Which document?

Mr. Dyer: The document that I offered and was received in evidence. It says here——

Mr. Thomson: Oh yes; wait a minute: let me look at it. With the reservation of my right to move to strike, I want to put a couple of the next ensuing questions to the witness.

The Court: Very well.

Mr. Thomson: Q. How many of the 80 planes referred to [390] in this document did TWA take delivery of?

A. I believe if you will reread that sir, there were about 40 to be delivered to Pan American.

Mr. Thomson: That is what I wanted to find out.

The Witness: About 40, to the best of my recol-

(Testimony of Henry G. Andrews.)

lection or thoughts at present, in the neighborhood of about 30.

Mr. Thomson: Q. That is, TWA took actual delivery of 30?

A. To the best of my recollection. I couldn't testify to that accurately.

Q. Those of course were not assigned to the San Francisco Airport; they were put into service throughout the system of TWA?

A. I dare say 20 to 25 of them have been in the San Francisco Airport.

Q. But not all at the same time, of course?

A. Hardly.

Q. I refer you to a document which I consider an official document.

Mr. Dyer: May I see it.

Mr. Thomson: Differentiating this document from the type of document thus far presented by the counsel for the plaintiff.

Mr. Dyer: Mr. Thomson, I understand that you consider the publications of the C.A.A. as official documents?

Mr. Thomson: Yes, I will go along with you on that.

Mr. Dyer: All right.

Mr. Thomson: Q. I have here a document entitled, "Statistical Handbook of Civil Aviation," dated in 1949, with a label "U.S. Department of Commerce," on the title page, and underneath that, "Civil Aeronautics Administration" and "For sale by the Superintendent of Documents at Washington, D.C." Are you familiar with this document?

(Testimony of Henry G. Andrews.)

A. No, sir, I am not.

Q. Have you ever seen it before?

A. I believe this is the first time I have seen that particular document.

Q. Then you do not make it a practice to consult this document with reference to these subjects we are talking about?

A. We had more direct orders for our consultation than that information.

Q. You have testified, as I recall, that the military led all other types of aviation so far as weights of planes are concerned? A. Yes, sir.

Q. I call your attention to language at page 45 of this document where the various years are summarized as to weights of planes—and these relate to military planes. The heading of this particular portion is “Average Air Frame Weight of [392] Military Aircraft Produced by Type: 1940, bombers, 7,709; transports, 8,569.”

Do you consider that accurate?

A. Would you read the heading of that again?

Q. “Average Air Frame Weight of Military Aircraft——” A. That is a different definition.

Q. That has to do with——

A. That could be interpreted in many ways: the air frame weight which could apply—which doubtless, with the figures you gave, would apply an airplane less engine and less a great many military equipment, load and so forth.

Q. In other words, your interpretation of it——

A. It would be just the bare——

(Testimony of Henry G. Andrews.)

Mr. Dyer: Just a moment. Let him finish.

Mr. Thomson: Yes; excuse me. I didn't want to interrupt.

Mr. Dyer: Proceed.

Mr. Thomson: Proceed.

The Witness: That would be only a bare frame which would be referred to from that heading.

Mr. Thomson: Q. What was the horse power of this Boeing plane that you flew here to San Francisco in 1940?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial; there is no showing as to horse power of these planes.

Mr. Thomson: Yes, there is, your Honor. As Mr. Thompson [393] testified yesterday, the development of these large planes up now to 120,000 pounds, as your Honor heard, revolves around the development of horse power in order to carry this extreme weight of these large sized planes, and that the horse power——

Mr. Dyer: Just a moment.

Mr. Thomson: Pardon me, please.

Mr. Dyer: I have an objection. I think we get to the ultimate question, your Honor, of how much the different planes weigh. If we go into excursions into horse power and so forth, I think that is a collateral inquiry.

The Court: It goes without saying that if they had not developed these wonderful engines they would be still on the ground with these 25,000 pound

(Testimony of Henry G. Andrews.)

planes. I think that is the purpose of the testimony.

Mr. Thomson: That is, your Honor.

The Court: Proceed.

Mr. Thomson: Q. What was the horse power of that plane?

A. To the best of my recollection it was in the neighborhood of about 3,600 horse power.

Q. You said 3,600?

A. That is the best of my recollection; I haven't had occasion to figure horse power for several years.

Q. What is the horse power of the present Super-Connie now in operation? [394]

A. Of the Super-Connie?

Q. Yes.

A. Which power would you refer to, the median power, climbing power, cruising power or take-off power? There are four different classes of power applied to that airplane.

Mr. Thomson: The witness has been confused, your Honor.

The Court: There is nothing unusual about that: we all get confused.

Mr. Thomson: No, that is quite——

The Witness: Cruising horse power?

The Court: Yes, give us all four.

Mr. Thomson: Q. Let us have all four.

A. The cruising horse power of a Super-Connie will range about 4,800 horse power.

Q. And I think you described this plane that you flew to San Francisco in in 1940 as a four cyclone engine plane?

A. Yes, sir.

(Testimony of Henry G. Andrews.)

Q. Will you give us the figure on that horse power?

A. Again do you want to differentiate the four types of horse power I referred to before.

Q. Pardon me; do you want to differentiate the four types of horse power with reference to the cyclone engine located in that plane in 1940 which you testified about?

A. We did not have the great differential at that time that we have today. I was speaking about the maximum power output [395] that we had on it at that time. When you reduce it to cruising power, it would be considerably less.

Q. When you gave me the figures on the horse power of that cyclone engine in that plane——

A. Yes.

Q. What type of horse power did you intend to give me?

A. That was the take-off horse power.

Q. How much was it?

A. Roughly 3,600.

Q. Can you give me the other types of horse power?

A. With the Boeing 307 we did not have the same differentials that we have with the Super-Connie. There is a cruising power on a Super-Connie or Super-Constellation—pardon my slang—which will run about 4,800 horse power.

Q. Did this cyclone, or rather this Boeing that you mentioned flying into San Francisco in have four engines?

A. Yes, sir.

(Testimony of Henry G. Andrews.)

Q. Was the horse power the same in each one of those engines?

A. Roughly 900 on each one.

Q. In other words, these figures that you have given me are the total——

A. Total horse power.

Q. The combination of all of the four engines?

A. Yes.

Q. Is that also true of the figures you gave me on the [396] Super-Connie?

A. Yes, sir.

Q. What type of octane fuel was utilized in this Boeing plane in 1940 that you have mentioned?

A. I do not recall definitely; it was in excess of 90.

Q. It was in excess of 90?

A. In excess of 90 octane; I don't recall exactly.

Q. But not substantially in excess of 90; 90 is the figure of the octane?

A. 90 would be pretty close. It wasn't less.

Q. And will you describe the type of fuel on the Super-Connie as of today?

Mr. Dyer: We object to that upon the ground that it is incompetent, irrelevant and immaterial. Your Honor, I think we are going far afield if we are getting into types of gasoline. This certainly is not involved in this case.

Mr. Thomson: This is along the same line of Mr. Thompson's testimony of yesterday when he testified that development in the fuel was of the utmost importance.

(Testimony of Henry G. Andrews.)

The Court: I think at this time I will allow it.

The Witness: Which one did you refer to last?

Mr. Thomson: Q. The type of octane fuel on the Super-Connie in operation today.

A. On the Super-Constellation, not the regular Constellation?

Q. The Super-Constellation. [397]

A. Super-Constellation is 115 octane.

The Court: What is it now?

The Witness: 115 on the Super-Constellation.

The Court: With this modern gas, is that the situation now, 115?

The Witness: Well, that is what we use in that particular plane.

The Court: What do they use?

The Witness: In the normal plane, your Honor?

The Court: Yes.

The Witness: We normally use in the regular Constellation, we use 100 octane.

The Court: Does it run any higher than that for any plane?

The Witness: 115 for the Super-Constellation.

Mr. Thomson: Q. You mentioned certain planes flying into San Francisco in 1940 by way of publicity or exhibition or whatever it was. You do not claim that those planes went into service in and out of the San Francisco Airport, do you?

A. You mean into scheduled service?

Q. Yes. A. No, sir.

Q. These two elements of damage to the airport that you have mentioned happened prior to the time

(Testimony of Henry G. Andrews.)

you left the Airport; that is correct, is it not? You left the Airport in 1942 after [398] you had accomplished your mission for this lease, apparently, and these elements of damage you have mentioned that you saw, for instance, the one from the P-38—those bits of damage that you described all were prior to the lease; is that correct?

A. Yes, sir.

Q. And do you remember that incident about the P-38? Wasn't that a crash? A. Yes, sir.

Q. And was that damage repaired?

A. It was quite a while being repaired. They had considerable difficulty there getting it repaired and they were unable to use the hangar for a period of time on account of it.

Q. Do you know whether the United States Government made that repair?

A. That I do not know. I dealt directly with the City.

Mr. Thomson: That is all.

Mr. Dyer: No questions.

We have no further witnesses, if the Court please.

(Witness excused.)

The plaintiff and cross-defendant rested in rebuttal.

Mr. Thomson: We will call Mr. Burr, please.

GEORGE DAVID BURR

recalled as a witness for the Defendants and Cross-Plaintiffs [399] in rebuttal; previously sworn.

The Clerk: George D. Burr to the stand; heretofore sworn.

Direct Examination

Mr. Thomson: Q. Mr. Burr, there was a technical word used here this morning which has escaped me. It relates to these piles of dirt.

Mr. Dyer: Revetments.

Mr. Thomson: Revetments.

Mr. Dyer: I think it is r-e-v-e-t-m-e-n-t, but I will not guarantee the spelling.

Mr. Thomson: Q. Mr. Burr, are you familiar with those revetments at the Airport?

A. Yes, sir.

Q. And where were they located with reference to the various runways?

A. They were outside of the landing strip, which is materially outside of the runways themselves. They were built on little spur taxiways on remote location.

Q. How did they individually compare as to size?

A. They were of varying sizes. There were about four of them, as I recall, that were for larger aircraft and the rest were for pursuits.

Q. Four only were for larger aircraft, which embody, I take [400] it, extra size?

A. Yes; my recollection of the count was 17 total; there might possibly have been two or three more.

(Testimony of George David Burr.)

The Court: The purpose of them was to give shelter in the event of bombing?

A. In case of bomb blasts close to aircraft to provide these mounds of dirt in cloth bags.

Mr. Thomson: Q. Did you observe any effect upon the airport from those revetments?

A. Yes, sir, the drainage system was somewhat damaged and the field surrounding was damaged to some extent, which was repaired by the Army as part of their obligation. There was no damage to the taxiways or runways or aprons as a result thereof.

Mr. Thomson: You may take the witness.

Cross Examination

Mr. Dyer: Q. Do you have any knowledge of approximately how much those revetments weighed, Mr. Burr?

A. I haven't computed it; they were of substantial weight.

Q. Do you have any figure in mind?

A. No, not offhand. These revetments as mentioned were constructed by filling cloth bags largely with earthy material, and of sufficient height to about reach the upper portions of the aircraft to be protected, so they were of substantial [401] weight, built in horse shoe shape.

The Court: Q. In any event, did they interfere with the efficiency of the runways?

A. No, sir, they were built outside of the landing strip areas, your Honor.

(Testimony of George David Burr.)

Mr. Dyer: I think that is all.

The Court: Step down.

(Witness excused.)

Mr. Thomson: Mr. Messersmith, please take the stand.

HAROLD STANLEY MESSERSMITH
recalled by the defendants and cross-plaintiffs, in
surrebuttal, previously sworn.

The Clerk: Harold Messersmith; heretofore sworn.

Direct Examination

Mr. Thomson: Q. Mr. Messersmith, you know, of course, Mr. Andrews, the gentleman who was on the stand? A. Yes, I do.

Q. Are you familiar with the fact that Mr. Andrews left the Airport so far as active duties at least were concerned in the latter part of 1942?

A. To the best of my recollection, that was approximately the date.

Q. Did you thereafter see Mr. Andrews from time to time? [402]

A. Yes, Mr. Andrews came through the Airport and into the Administration Offices at various times.

Q. And did you meet him at the Airport offices from time to time?

A. Yes, on infrequent occasions.

Q. This is after 1942?

A. Yes, that is correct.

Q. Do you recall an incident where Mr. Doolin discussed with Mr. Andrews certain projections of

(Testimony of Harold Stanley Messersmith.)

the runway and referred to a map or a diagram in his office?

A. I worked with Mr. Doolin in the preparation of a plan that I believe Mr. Andrews is referring to, and to the best of my recollection that plan was not under preparation until the latter part of 1943; and as I recall it Mr. Andrews about that time visited the Airport and showed the plan to Mr. Doolin in my presence and solicited his comments as to what he thought about the plan.

Q. You say Mr. Andrews showed the plan to Mr. Doolin?

A. Pardon me; Mr. Doolin showed the plan to Mr. Andrews. I do not recollect any runways indicated on the ultimate development in excess of 10,000 feet, and to my recollection Mr. Andrews at that time expressed doubt as to whether runways of that length would be required. I do not think he objected to the 8,000 foot runways that were then in effect or then contemplated for development. [403]

Q. When according to your best knowledge did this interview that you have described occur?

A. To the best of my recollection between—the last half of 1943 when we were then preparing plans that would fit into development that was to be undertaken by the United States Government at the Airport—that is, the Army Engineers.

Q. Are you familiar with the horsepower of the Boeing plane of the type that has been described as first flying into the Airport in 1940?

(Testimony of Harold Stanley Messersmith.)

A. Yes, I know the approximate maximum horse power.

Q. That was a four-engine plane, was it?

A. Yes, it was a four-engine plane.

Q. Will you give us the horsepower of that plane by units of engines?

A. I understand the maximum horsepower of the engines there rated at approximately 900 horsepower per engine. [404]

Q. Now, likewise with reference to the Super Constellation, will you give us the horsepower of that, the units?

A. The latest aircraft that I understand is under construction for TWA by Lockheed, a Constellation, calls for an individual horsepower somewhere in the neighborhood of 3,500 horsepower per engine. That would be a total of 14,000 horsepower, maximum.

Q. Do you have familiarity with a type of operation that has been referred to in the evidence thus far as locking of a wheel? Have you observed that from time to time at the Airport?

A. Yes, I have observed it from time to time, and we caution the airlines not to do it, ask them to disseminate the information as to the fact that it causes deterioration or destroys the runway surfaces. We continually have to keep up campaigns of this nature to minimize those abuses.

Q. Will you describe the extent of any deterioration caused in that regard by the present heavy

(Testimony of Harold Stanley Messersmith.)

planes now in use as contrasted with the lighter planes formerly in use?

A. Well, a light plane on a—a lighter plane does not necessarily damage the airplane. As to——

Q. You say damage the airplane?

A. Damage the paving.

Q. All right.

A. If it is an extremely light airplane that locks its [405] wheels in the turns, no damage frequently will ensue; and the greater the weight of the craft, the more damage to the paving sustained by the locking of the wheels.

Mr. Thomson: You may take the witness.

Mr. Dyer: I have no further questions.

Mr. Thomson: That is all, Mr. Messersmith.

(Witness excused.)

Mr. Thomson: Your Honor, as I indicated, I sent for a copy of the Call for Bids with reference to the TWA lease. Unfortunately, the gentleman who turned them over from the real estate department has left. I take it, counsel, you will accommodate me by stipulating the authenticity of this?

Mr. Dyer: Yes.

Mr. Thomson: Now, without the necessity of reading all the way through that, what I am going to offer are the last three lines of the second paragraph.

Mr. Dyer: I would like to inquire at this point whether this is the same document attached to the lease?

Mr. Thomson: The document you attached to the

lease I believe was the resolution of the Board of Supervisors. This is headed "Notice of Lease", and what it amounts to is the call by the Director of Property for competitive bids.

I don't have in mind that you attached it to any other documents. You might review those documents that you did attach to the complaint. I don't recall that you did. Is it [406] alright to stipulate to the authenticity of it.

Mr. Dyer: Yes.

The Court: Subject to correction.

Mr. Dyer: Subject to any question that we might bring to the attention of the Court.

Mr. Thomson: That will be agreed on. We are interested in accuracy along with counsel.

The Court: Yes.

Mr. Thomson: This is headed "Notice of Lease", and I take it your Honor will not desire me to read the whole document because what I refer to is contained within three lines. If I may just read that portion, anything counsel wants to add, he may.

In the second paragraph it in substance provides that the premises are to be leased to a person, firm, or corporation engaged in the transportation by aircraft of persons, property, etcetera. And then that paragraph terminates with these words:

"Subject to the provisions of said Ordinance No. 1736——" Is that it?

Mr. Dyer: That is what I get, Mr. Thomson.

Mr. Thomson: "——and to the terms and conditions set forth in the proposed lease on file in the office of the Director of Property." [407]

Mr. Dyer: I believe we also should call to the Court's attention the fact that this refers to the terms and conditions set forth in the proposed lease, and also refers in the last sentence of paragraph 1:

"Also 190 square feet on the first floor and 799 square feet of space on the second floor of the Administration Building located at said Airport, together with certain airport privileges and facilities."

I would suggest, Mr. Thomson, we put in this entire document.

Mr. Thomson: Yes, I will do that, if that is what you desire. I offer this in evidence, if your Honor please.

The Court: It may be admitted and marked.

(Thereupon call for bids referred to above was received in evidence and marked Defendants' Exhibit Q.)

Mr. Thomson: We have concluded with surrebuttal.

Mr. Dyer: I have nothing further, sir, except this: I am going to ask, in the light of Mr. Thomson's statement that he considers the report of the Civil Aeronautics Administration an official document, that the Court take judicial notice of the contents of a publication of that Administration dated May 8, 1941, which concerns the weight of aircraft to be considered in the design of runways, aprons, paving areas, for the next ten years,—subsequent ten years. [408]

Mr. Thomson: Do you have a copy of that with you?

Mr. Dyer: I do not have a copy of that with me.

We are endeavoring to obtain it. We may make reference to it in our briefs.

Mr. Thomson: Well, I don't think we should keep this case open just for the purpose of further documents.

Mr. Dyer: I don't propose to introduce it. I am simply asking the Court to take judicial knowledge of the contents of that document that you——

Mr. Thomson: No, no, no.

Mr. Dyer: ——stated was an official document.

Mr. Thomson: I don't think that is within the realm of propriety. I think you at least have to introduce the document in evidence. An official document doesn't mean you can ad lib reference to anything you find in an official document. I think we should have the right to compare the document, and we may have documents or matters that would be in refutation of that document. We ought to know what it is all about, in other words.

Mr. Dyer: I think you are entitled, Mr. Thomson, to know the contents of any document we refer to, and of course if we refer to any document in our brief or any subsequent papers filed with the Court we will furnish you a copy of that document. But at the same time, I think the Court can take judicial notice of the contents of an official [409] publication of the United States Government, and that is all I am adverting to.

Mr. Thomson: I don't know whether that is true or not.

The Court: Are you familiar with the subject matter of this document?

Mr. Thomson: No, I am not, your Honor.

Mr. Dyer: The subject matter is this, if the Court please: It is a publication of the Civil Aeronautics Administration dated May 8, 1941, and it contains the design data for paved runways and loading standards, and says: "Probable future. Ten-year maximum. Static. Loads to be considered in the design of runways and aprons and paving and drainage structures."

And for Class 3 airport it states 150 thousand pounds with reference to weight of aircraft, and for Class 4 airports, 300,000 pounds. And Class 4 City is defined as "Cities representing the major industrial centers of the Nation and important junction points or terminals on the airway systems."

The Court: Where did you get that language?

Mr. Dyer: This language was furnished to me by a technical employee of TWA who stated he obtained it from this document.

The Court: The document is not in evidence?

Mr. Dyer: I do not have it with me, no, sir.

The Court: I can't consider it unless it is based on [410]

Mr. Dyer: It has been temporarily mislaid, your Honor, and I am simply asking the Court to take judicial notice of the contents of that document as we refer to it.

The Court: I don't want to mislead you. It means nothing to me unless it is produced. I say that kindly.

Mr. Dyer: I understand, sir. Can we reserve the right to produce it, your Honor?

The Court: Can you produce it by 2 o'clock?

Mr. Dyer: I doubt it, sir. This is a far-flung airline system and it is difficult to obtain documents of that nature.

The Court: I am here to serve you gentlemen. You will have to proceed. You answered ready for this trial.

Mr. Dyer: Well, we ask the right to produce that document for the benefit of the Court, and also ask the Court to take judicial notice of its contents on the ground it is an official document of the United States Government, and that counsel has stipulated that documents——

The Court: Who here is familiar with the document we are discussing?

Mr. Loring: I am, your Honor. I have seen the document, and I am the one who prepared the memorandum from which counsel just read.

The Court: What kind of document was it?

Mr. Loring: It is a booklet very much like the booklet [411] that Mr. Thomson interrogated his witness about. It has in detail the rules of the CAA on design of airports and what cities of different classes will expect in the future.

The Court: When was it published?

Mr. Loring: It was published May 9th, 1941. I examined the document at the head office of TWA in Kansas City, in their files there, and I made these excerpts from the document.

Since that time, which was about several months ago, the document has been mislaid and we cannot locate it. And we haven't had an opportunity to go

to the CAA in Washington, or possibly we could get it in Oakland, to get another copy of the same document.

The Court: We will take an adjournment until 2 o'clock. You may be able to locate it. Tell me, with that thought in mind, that will be the case? Submitted?

Mr. Dyer: That would be our case, Your Honor. At this time it may be in order to make certain suggestions to this Court that Mr. Thomson and I have given some thought to. With reference to the motions to strike, your Honor, they are rather numerous and we believe they concern questions of law, and it is our thought that considerable time could be saved if those motions were presented to the Court by way of written motions.

Mr. Thomson: I am going to suggest to your Honor that [412] this case be submitted upon briefs, and I don't think in the light of that that there should be any extended legal argument on the motions. They should be merely motions to strike, with each side being given the opportunity to respond.

Mr. Dyer: Yes.

The Court: How much time do you wish on the briefs?

Mr. Thomson: How much time would you require, Mr. Dyer?

Mr. Dyer: I would suggest that 30, 30 and 20, your Honor.

The Court: I would forget everything we have gone over for the last four days by that time.

Mr. Thomson: I didn't understand what your Honor said.

The Court: My memory won't carry me over that period of time. I think we should have argument on it and get the theory of the case on both sides of the case, and it may be you wouldn't have to file briefs.

Mr. Thomson: Would it be agreeable to your Honor to submit briefs in the first instance, and then your Honor calls for oral argument and indicate the subjects that you want orally argued?

I will say this, that this is quite a complicated case, not only from the standpoint of facts but from the standpoint of law.

The Court: I understand that. That is the reason I am trying to stay with the case until we dispose of it. [413]

Mr. Dyer: Your Honor, I believe Mr. Thomson and I may agree—perhaps I am just putting his statement in other words—that we file briefs in the case and the Court, if it sees fit, call for oral argument.

The Court: Well, I am here to serve you gentlemen. If I am not here in this case I will be here in some other case.

Mr. Thomson: We, on the other hand, want to accommodate your Honor.

The Court: I think we should cut the time to 10, 10 and 10, and I permit argument after I check through the briefs. That is what I am trying to accomplish.

Mr. Thomson: That would be agreeable to me.

Mr. Dyer: Could you make that 15, your Honor?

Mr. Thomson: Why don't we make it 15, 10 and 5? That is the same length of time?

Mr. Dyer: That is agreeable to me.

The Court: 15, 10, 5? Is that agreeable?

Mr. Dyer: Yes.

The Court: That will bring us to what date?

The Clerk: That will be October 16th for submission.

Mr. Dyer: All right, your Honor, and we may in the meantime file our written motions to strike?

The Court: You can get together on that, perhaps.

Mr. Dyer: Yes, sir. [414]

The Court: Now, I am sure I will call for oral argument. On account of it being the type of case it is, after you submit your briefs, I am going to set it down on the calendar for oral argument. So keep that in mind. If both sides prepare well, it will be helpful to the Court.

Adjourn to 2 o'clock.

(Thereupon an adjournment was taken to the hour of 2 o'clock p.m. this date.) [415]

Mr. Dyer: If the Court please, during the noon recess counsel for plaintiff made inquiry of the Regional Office of the Civil Aeronautics Administration and was advised that the pamphlet to which we referred and to which we adverted in our offer of proof was in existence, and we made rather strenuous efforts to discover a copy of it in this area and were finally advised it was not available here.

On that basis I believe I should state to the Court

that we simply request that judicial notice be taken of that document on the basis that it is an official publication of the Civil Aeronautics Administration which is a division of the Department of Commerce of the United States Government.

Mr. Thomson: If your Honor please, I think that the rule of judicial notice is one thing and the rule of admissibility in evidence of official documents is quite another thing. I believe that in all fairness under the rules of evidence as I conceive them, we are entitled to be confronted by this very document. We may in that event feel the necessity of offering to your Honor some evidence upon this document or some other document, and to allow counsel to simply at random refer to what he characterizes as an official document in his brief is not in fairness to this defendant.

The Court: I always find an avenue of escape on these [416] matters. You will have plenty of time to get it. This case, after you file your briefs, will be set down for further trial and limited to that document. How is that?

Mr. Dyer: That is agreeable.

Mr. Thomson: You mean if the document is available we will receive it at that time?

The Court: The document must be here so that you have an opportunity to be confronted with it whatever it may be.

Mr. Thomson: Yes. Of course, I don't know what it is. I may feel constrained to ask your Honor to reopen the case on it.

The Court: It is limited to the document under discussion.

Mr. Thomson: Yes.

Mr. Dyer: Your Honor, I should like to offer in evidence a similar document of the Civil Aeronautics Authority. We were able to obtain a copy of this document. It is dated May 1, 1940. Page 43 thereof contains recommended standards for probable future maximum static gross loads to be considered in the design of runway and apron paving and drainage structures, for Class 4 Airports of 300,000 pounds. Here is that document, Mr. Thomson.

Mr. Thomson: I should like to not make any objection to this document, but I should like to recommend that the whole document be introduced.

Mr. Dyer: That is agreeable. [417]

Mr. Thomson: So that we may have sufficient time to examine the document.

The Court: No objection?

Mr. Dyer: That is agreeable. I now offer for identification and in evidence that document headed, "Civil Aeronautics Authority, Technical Development Division, Airport Section. Airport Design Information." And it also bears the notation "Prepared for the Instruction and Guidance of the Airport Section Engineers in their Field Consultation Activities," and dated May 1, 1940.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 24 admitted and filed in evidence.

Mr. Dyer: I have nothing further, if the Court please.

(Whereupon document above referred to was marked Plaintiff's Exhibit No. 24 and admitted into evidence.)

Mr. Thomson: I have nothing further, if the Court please.

The Court: There will be no extension of time on the briefs, gentlemen, so we will finally dispose of this matter—it went over to what date, Mr. Clerk?

The Clerk: October 16th, Your Honor, for submission.

The Court: After I check on the briefs, since there are some matters in relation to this case that I will probably have some difficulty with, I will have you gentlemen come in and take the work and labor off my shoulders and give you an [418] opportunity to persuade me of whatever your views may be; but I want to check on the cases cited and the theory of your case.

Over to what date?

The Clerk: October 16th.

The Court: October 16th.

Mr. Thomson: The schedule for the filing of briefs is——

Mr. Dyer: Fifteen, ten and five.

Mr. Thomson: Fifteen, ten and five.

Mr. Dyer: It is understood we will file written motions to strike.

Mr. Thomson: Well, in the time that is allowed

for the briefs you are also going to file written motions?

Mr. Dyer: That is correct.

Mr. Thomson: So that your fifteen days, without being too hard-boiled, starts tomorrow.

The Court: You can on reference to your record prepare a digest of it. You have the transcript so you will have no difficulty on that score.

Mr. Thomson: Does Your Honor desire a copy of the document you just mentioned?

The Court: Not necessarily. If you gentlemen don't protect yourselves, don't expect me to protect you. However, I will leave this thought with you:

I allowed the widest latitude, left the door open for [419] counsel to almost present anything. I say that advisedly. Do I make myself clear?

Mr. Dyer: No, sir.

The Court: The scope of your examination covered such a wide range that counsel had an opportunity to answer that.

Mr. Dyer: Yes, I understand, sir.

The Court: That is what I meant.

[Endorsed]: Filed December 3, 1953.

TRANSCRIPT OF ORAL ARGUMENT
TO THE COURT

Wednesday, December 30, 1953, 10:00 a.m.

The Clerk: Trans World Airlines, Incorporated vs. City and County of San Francisco, further argument.

Mr. Holm: Ready for the defendant.

If Your Honor please, before we proceed to argument, which I assume we are here for this morning, I would like the privilege of correcting our record in certain respects.

I have presented these documents to Mr. Dyer before the Court came into session, and they relate to rates and charges as they are established by the Public Utilities Commission for the three years involved and as they were eventually passed by the Board of Supervisors.

In the first group, which Mr. Dyer has agreed that it will not be necessary to call the deputy clerks who have signed these documents in the interest of time saving on the record, but whatever objections legally he has to make, I assume he will reserve to himself; but the first group of papers that I desire to introduce and to be given the appropriate number or initials is Resolution No. 4423 of the Public Utilities Commission that was adopted on June 2, 1941.

That is a resolution—it is short—that directs the Clerk to publish notice, as required by Section 130 of the Charter, of the hearing of the proceedings. And next under that same letter of exhibit, I desire

to submit the affidavit [421] of publication in the Call-Bulletin, which was then the official publication, of the requisite number of publications of that notice, namely on June 5, 1941, June 6, 7, 9 and 10 of 1941.

The third document under this same exhibit number would be Resolution No. 4474 of the Public Utilities Commission of the City and County of San Francisco, passed June 23, 1941, establishing an airline schedule of rates and charges as of that time. And the final document for this exhibit would be the journal of proceedings of the Board of Supervisors dated Monday, June 30, 1941, and particularly that section of it that appears on pages 1404 and 1405 of this journal of proceedings, which is the schedule of charges to commercial airline transportation companies for the use of the San Francisco Airport in San Mateo County as passed by the Board of Supervisors of the City and County.

I submit these several documents and ask that they be given one exhibit initial and ask that they be admitted in evidence.

Mr. Dyer: No objection.

The Court: So ordered.

The Clerk: Defendants' Exhibits R-1, 2, 3 and 4 admitted and filed in evidence.

(Thereupon the documents identified above were received in evidence and marked respectively [422] Defendants' Exhibits Nos. R-1, R-2, R-3 and R-4.)

Mr. Holm: I have two more here. Excuse me.

Mr. Dyer: Pardon me.

Mr. Holm: I don't like to burden or to take up the Court's time. Without my enumerating each one of the documents for the year 1946, beginning with Public Utilities Commission Resolution No. 7504, and the affidavit of publication of the notice of the hearing given for the statutory time as set forth in the Charter of the City and County of San Francisco, in the San Francisco Chronicle, which was then the official newspaper of the City and County; Resolution No. 7829 of the Public Utilities Commission passed November 25, 1946; and Resolution No. 6106 series of 1939 passed by the Board of Supervisors on December 31, 1946; and Resolution No. 7899 of the Public Utilities Commission passed on January 6th, 1947, and ask that those five documents that I have enumerated be considered as the next in order as an exhibit for the City and County of San Francisco.

The Court: Let the record so show.

(Thereupon documents identified above were received in evidence and marked respectively Defendants' Exhibits Nos. S-1, S-2, S-3, S-4.)

Mr. Holm: And the third group that I have, Your Honor, relates to the year 1950, and so far as identification under the next initial, is a Public Utilities Commission Resolution [423] No. 11093 passed October 16, 1950; and an affidavit of M. M. Potter, as publisher of the San Francisco Chronicle advertising them in the paper, which was then the official newspaper of the City and County of San Francisco; Resolution No. 11182 of the Public

Utilities Commission passed November 20, 1950; and finally Resolution No. 10628 series of 1939 passed by the Board of Supervisors December 20, 1950, and I would ask that those documents all be included as the exhibit for the City and County of San Francisco and be given its appropriate marking.

The Court: Let the record so show.

(Thereupon the documents identified above were received in evidence and marked respectively Defendants' Exhibits Nos. T-1, T-2, T-3 and T-4.)

Mr. Holm: Thank you, Your Honor.

Argument on Behalf of the Plaintiff by Mr. Dyer:

Mr. Dyer: If the Court please, this case concerns the lease executed by Trans World Airlines, an international air carrier, and the City and County of San Francisco on October 1st, 1942.

In the lease the City demised to the airline the use of certain space, such as space for the storage of its planes and space for ticketing and other purposes, for a period of twenty years. [424]

In the same document the City specifically made available to the airline the use of certain facilities such as runways, taxiways and ramps and parking areas, for the same period.

In that lease document, the use of those facilities were made available to the airline for the same lease term, that is, a term of 20 years at a definite rental.

I think it might be helpful to the Court if I

stated the type of operation conducted by the airline and the method or relation under which it operated at the airport at the time the lease was executed and for a short time prior thereto.

TWA recommenced scheduled operations at the San Francisco Airport in 1937. At that time Mr. B. M. Doolin, who was a man of great experience in aviation and who is now director of aeronautics for the State of California, was the chief managing officer of the City and County of San Francisco Airport. He was the manager of the airport and so continued as manager until approximately 1950.

Also about that time Mr. H. B. Andrews, a man also of great experience in aviation, became division manager for TWA at San Francisco. The two chief men thus representing the City and TWA respectively were Mr. Doolin and Mr. Andrews.

At that time, according to the record, Your Honor, TWA was operating its planes on a month-to-month basis and paid rentals to the City and County of San Francisco for the use of certain space and for the use of those facilities on that [425] basis. There was no formal agreement between the City and County and the airline at that time.

Aviation was developing rapidly. The City and County was developing its airport and it desired to retain the presence of an international air carrier such as TWA at the San Francisco Airport.

Mr. Doolin thus approached Mr. Andrews and pointed out to him that the City thought it desirable that it should retain the presence of this in-

ternational air carrier on a sustained basis with the economic and civic advantages that would result therefrom.

It was also pointed out that if a long term lease was entered into, certain advantages would accrue to TWA. Thus, if its charges were set at a certain level for a long term period, TWA would know what its costs would be at the San Francisco Airport for that period.

Thus, Your Honor, to put it as precisely as I can, the advantages were these: that the City would obtain the sustained presence of an international air carrier with the economic and civic advantages that would result therefrom for a long period at the San Francisco Airport, and TWA would be able to know with some certainty what its costs for operations at the San Francisco Airport would be. Those in essence were the considerations that were discussed by those two chief men at the time that the lease negotiations were [426] initiated.

Apparently these discussions were held over a long period of time. Mr. Andrews states that he discussed them with Mr. Doolin from time to time almost from the time in 1937 that he came to the airport.

Formal negotiations apparently commenced six months to a year before 1942. There were many conferences held, and among the things that were discussed was the term of the lease. The evidence of Mr. Andrews is that Mr. Doolin suggested that the term of the lease be for 20 years. [427]

There is also evidence from the record that Mr.

Doolin set the level of the rentals for the lands and also computed the level of the charges or fees for the use of the facilities.

Mr. Andrews at first demurred to the level of these charges on the basis that he thought they were too high. But again it was pointed out to him that the airline would have certain advantages from having this lease, and eventually it was agreed that the lease should be executed in its present form.

During this time and, as Mr. Andrews put it, "when legality became a factor we conferred with the City Attorney and with the Public Utilities' counsel." And the record shows that on at least four or five occasions such conferences were held with the chief officers of the City who advised the parties concerning the legality of the document and the conformity of the document with the provisions of the City Charter.

The lease then was executed on October 1, 1942. It was signed by members of the Public Utilities Commission; it was signed by the Mayor; it was approved by the Public Utilities Commission counsel of the City and County. Thereafter it was unanimously adopted and approved by resolution and vote of the Board of Supervisors.

Since that date the airline has operated under the provisions of that lease at the San Francisco airport and at all times has paid, and still pays, the rentals and charges [428] provided therein.

In its turn, the City has also observed the provisions of this lease and has accepted the rentals

and charges which have been paid by the airline pursuant to the terms of the lease document.

I wish to emphasize to Your Honor that no breach of this lease is claimed by the City and County as a basis for this action. It in effect admits that the lease was fairly and openly entered into after reflection and negotiation.

Its claim in essence is this: that when it found that the lease was not a good bargain as to it, that its Public Utilities Commission, which is manager of the airport had executed this document, could, by the imposition of rate-making power supersede and impose on this document charges substantially higher than those which it had agreed to in the lease document. Thus, in September 1946, a schedule of rates and charges was promulgated which provided for charges substantially higher than those provided in the lease.

Similarly, in 1951 another schedule of rates and charges was passed.

During all this time TWA paid the charges and rentals provided in the lease, and the City, during the time that these schedules were in existence, accepted these rentals and charges.

Finally, however, Your Honor, in 1949, after seven years [429] of operation under the lease, the City advised the airline by letter that unless it paid the rentals and charges provided in the 1951 schedule, which were about 100 per cent over the schedule of rates and charges provided in the lease document, that it would not be allowed to gas its planes

at the San Francisco Airport. This action was then initiated.

Now, Your Honor, I would like to state at the outset that the decision in this case will determine to a great extent the validity, of course, not only of this lease, but of other leases at the San Francisco Airport involving other airlines. It also of course will have a great effect on the validity of similar agreements which are in effect throughout the United States between airline operators and municipal airport operators.

The evidence in this case shows that TWA operates at 51 points throughout the United States, and at those points it operates under lease and contract agreements with airport operators and not by virtue of a Public Utility-Consumer relationship.

With reference to the position of the City in this case, it is, of course, that the rate-making power of the City supersedes and displaces the obligations which its Public Utilities Commission had agreed to in the lease.

It, however, has partially retreated from the position which it initially took and which is stated in its answer and [430] cross-complaint.

The lease, as I stated to Your Honor, concerns both land and facilities. In the answer and cross-complaint, the City raised an issue as to the validity of the entire lease, thus the validity of our lease for Hangar No. 4 and other space which we occupy exclusively at the airport.

However, at the trial of this case and in its

briefs, the City now quite clearly states that it no longer questions the lease of space, of land, of areas that we occupy exclusively. It would thus seem, Your Honor, that the City has no case by its own admission to recover back rents for those areas.

Thus in Paragraph VI on page 16 of its answer and cross-complaint, it prays for \$7,891 for back charges for hangar areas, and it would seem by its own admission that it no longer has a case on that basis.

The first inquiry that perhaps should be made in this argument is the authority of the City to enter into a lease of facilities.

Of course the action of the City and County in entering into leases of both land and facilities both before and after this lease with TWA we believe is rather strong evidence of the understanding of the City that it had such authority.

Thus, Your Honor, in 1940, before the TWA lease was executed, the City and County executed a lease with another [431] airline, a larger airline, at the San Francisco Airport involving a lease of land and a lease of facilities for a long term. And again in 1947, after the TWA lease, it again executed a long-term lease with that airline covering land and facilities at charges and fees different from those stated in the schedule of rates and charges.

In addition, may I point out that the chief law officers of the City at the time this lease was executed apparently advised the parties concerning its validity and its conformity with the Charter.

And it would thus seem that the City itself, by its actions and by the advice given by its chief law officers, was under the understanding that it could validly execute a lease of both land and facilities.

In addition, may I point out to Your Honor, that between the years 1946 and 1948, supplemental agreements were executed on three occasions renegotiating certain portions of the lease charges, but then reaffirming and approving the basic terms of the 1942 lease.

There is also, Your Honor, statutory authority for the leasing of the land and facilities.

Section 2 of the Charter of the City and County specifically empowers the City and County to lease both real and personal property.

Section 93 of the Charter, refers, Your Honor, to the [432] leasing of land. And certainly it must be taken that a lease of land carries with it the rights of ingress and egress and the right to use ways whereby this airline could get its planes to and from the hangars. Without the use of such rights of way and rights of ingress and egress, the use of the hangars would be of no use at all to this airline.

In addition, Your Honor, there is a statute of the State of California, still existing and in existence at the time of the lease, which specifically **allowed** the leasing of both land and facilities. That is the Municipal and County Airport law of the State of California. It was passed in 1927. That, Your Honor, was the year that the San Francisco Air-

port was created, and it was in existence at the time this lease was executed.

That statute specifically provides that a City operating under a freeholders charter or otherwise may lease or assign for operation such space or areas, appurtenances, appliances or other conveniences necessary or useful in connection therewith. Now, Your Honor, there is specific statutory authority of this State which allows the leasing of space and appliances and conveniences necessary or useful in connection therewith.

I might also briefly mention, Your Honor, Civil Code Section 718(c), which is also cited in our brief, which specifically allows the leasing of both land and facilities, and which was in existence at the time this lease was executed. [433]

I might state, Your Honor, that these statutes could be availed of by a chartered city when there is nothing in the charter in conflict with the statutes. And our examination has revealed nothing in the Charter in conflict with those statutes.

Your Honor, these statutes, we submit, of the State of California, which specifically refer to the leasing of appliances and appurtenances at airports shows the understanding of the Legislature of California that the leasing of facilities at municipal airports is proper.

I might state to Your Honor that there are in the State of California now many airports which make the facilities available to airport operators and plane operators under lease and under contract, and there are statutes of the State of Cali-

fornia in existence now in the Government Code and which are cited in our brief which specifically allow the leasing of facilities at municipal airports.

Doesn't that indicate the understanding of the Legislature of this State that facilities are a proper subject of leasing?

I should also quite briefly like to refer Your Honor to a few appellate cases which indicate the power of a city and county with reference to leasing a municipal airport.

In *Pipes against Hildebrand*, a California case again cited in our brief, it was specifically held that a hangar could be leased at the Fresno Municipal Airport. [434]

In *Laurent against City and County of San Francisco* the question was whether the Public Utilities Commission of the City and County of San Francisco could reject a bid for common space for a parking area for automobiles at the San Francisco Airport. The District Court of Appeal there pointed out that the Public Utilities Commission had broad powers in such a case and that it could determine for itself its procedure and that it could validly lease that common area.

Appellate decisions in other states of the United States which have had to do with the leasing of airports indicate quite clearly that the leasing of facilities is proper. Thus, in *Milwaukee against Town of Lake*, a Wisconsin case, the Court there was concerned there with the validity of a lease of exclusive space for automobiles at that airport. It, however, quite clearly referred to the fact that the

airlines had made contracts with the municipal operator of the airport, which was General Mitchell Field and it stated this, Your Honor:

“The contracts entered into between Milwaukee County and the common carrier passenger airline concerning the use by the latter of the facilities of General Mitchell Field are legal and valid and a proper exercise of the power of Milwaukee County in the management of General Mitchell Field”.

Your Honor, we believe that that latter statement brings [435] us to a consideration of this problem, and it is this: What was the capacity in which the Public Utilities Commission of the City and County acted when it executed this lease and when it fixed the rentals and charges therein? Did it act in its governmental capacity or did it act in its proprietary capacity? That is the thing that is important, because the cases quite clearly hold that if a municipality makes a contract in its business capacity, if it makes a contract with reference to the management of a business such as an airport, that it is bound by that contract to the same degree and extent as any private person or corporation and cannot thereafter, by claiming a governmental power, evade its obligations under that contract.

I might point out to Your Honor at this point that if we did not have a city and county in this case—let us suppose that this was a lease with the Lockheed Air Terminal in Los Angeles, which is a private airport serving international and domestic carriers, that we wouldn't have any question concerning the validity of this lease.

But to get back to the question: In what capacity was this contract or lease executed? May I point this out to Your Honor: That this airport is a big business. It is a business run by the City and County of San Francisco for the benefit of the inhabitants of the City and County of San Francisco. The record shows that over nine thousand employees [436] a day come to the airport.

There are many businesses with which the City and County of San Francisco through its Public Utilities Commission makes contracts. Thus, it makes contracts with the telephone company to provide telephone service. I understand they are going to have a bank down there, Your Honor. They are going to have many other businesses which will be there at the airport just as the airline, who will bring their services and their facilities so that the inhabitants of the City and County can be served.

The point to be made is this, Your Honor: that in the making of those contracts, the City was operating its business, and in so operating its business it was bound by the same rules of law applicable to any private person.

I should like briefly to refer Your Honor to a few of the appellate cases which touch upon that problem. In *Coleman vs. City of Oakland*, a District Court of Appeals case in California, the court pointed out, in deciding the capacity in which an airport was conducted and operated:

“We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity.”

In *Ex Parte Houston*, which was an Oklahoma case, the validity of a contract involving the use of certain facilities and common ways for the use of taxicabs and so forth at the [437] Will Rogers Municipal Airport was at issue. The court there discussed the capacity in which the City acted in operating this airport and in executing that contract, and the court said this:

“Here the City of Oklahoma City was acting in a proprietary capacity as distinguished from a governmental capacity. This fact is the key to the solution of this case.”

Your Honor, the City has taken the position that at any time, by the exercise of its so-called governmental or rate-making power, it can supersede the rates and charges and rentals stated in our lease and impose upon those rentals and charges higher rates.

It has cited cases in its reply brief in support of that position. Those cases, of course, ignore the fact that the contracts involved in those cases were not rate contracts.

A rate, Your Honor, in its true sense, is the price or charge made to the individual public, to the millions of the members of the public, for the provision of a recognized public utility service.

Our position here is that this lease, whereby the airline hires definite space and definite facilities for a definite term, is not a rate contract. It does not involve the provision of a public service to the millions of members of the indefinite public. [438]

The inquiry here, Your Honor, is: Who is the

public in this case? Is it the 12 schedule airlines and the other business operators at the San Francisco Airport who bring their facilities there and use the facilities, or is it the 3,250,000 members of the public who last year utilized the San Francisco Airport?

Your Honor, the rentals and charges included in this lease are not applicable to nor are they paid by any of the members of that 3,250,000 public.

Our position thus is that this is a private agreement for the use of definite space and facilities between the parties and does not involve a rate applicable to the indefinite public.

The appellate cases that have had occasion to discuss their problem, Your Honor, have quite clearly pointed that out. Thus in *Marin Water Company vs. Town of Sausalito*, the problem there was the validity of a contract between a water company and the Town of Sausalito. The water company by contract supplied water wholesale to the Town of Sausalito at stipulated rates for a definite term stated in the contract. The Town of Sausalito in turn used that water to supply the many hundreds of the members of its public. The contract came under attack. Its validity was at issue. The Town of Sausalito refused to pay the charges stated in the contract on the ground that it could exercise its governmental powers. [439] The Supreme Court of the State of California quite clearly pointed out that this was not a contract to which that principle was applicable; that this was simply a contract whereby one utility made its service

available to another utility, whereby in turn the public might be served, and that the indefinite members of the public, the inhabitants of Sausalito, were not parties to that contract, and thus the contract was valid and binding.

The Supreme Court of the State of California in a later case as recently as 1950 also was concerned with that principle and with that problem. There the license contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company was at issue. That was a contract between two utilities. It provided that A T & T would make available to P T & T certain services and facilities at a definite rate for a definite term. The Public Utilities Commission of the State of California sought to impose regulation upon that contract and to substitute for the price stated in that contract a different price set by the Public Utilities Commission. The Supreme Court of this State, with Justice Trainor writing the opinion in 1950, pointed out that this was not a rate contract and that the individual members of the public were not parties to that contract and it therefore was valid and binding. Thus, Your Honor, the court stated this: [440]

“The Commission’s control over contracts affecting rates and services is limited to regulation of contracts that directly affect the service the ratepayer will receive at a particular rate.”

And they further pointed out, since this was simply a contract between two utilities, whereby

the public, in turn, might be served, that it was valid and binding and not subject to regulation.

Your Honor, I think that we might consider for a moment, and possibly it might be helpful, if we considered the cases that deal with the analogy between the use of a dock and a wharf and the use of an airport.

The reason for that is this: That there is a body of law concerning contracts dealing with the use of wharves and the analogy between the use of wharves and docks and airports has been very clearly pointed out in the cases. Thus Justice Cardoza, who perhaps was the first judge to note that close analogy and to state it in an appellate decision, in *Hesse vs. Rath*, cited in our brief, stated:

“A city acts for city purposes when it builds a dock or a bridge or a street or a subway. Its purpose is not different when it builds an airport.”

And in *Coleman vs. City of Oakland*, the District Court of Appeals in this State said:

“Its nearest analogy is perhaps found in docks and wharves. ‘An airport with its beacons, landing fields, runways and hangars is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those that navigate the air.’ ”

The Courts of Appeals of this country have also noted the close analogy between the two. The Fourth Circuit, in *Mayor and City Council vs. Crown Cork and Seal* stated:

“The analogy to an airport seems to be complete and has been so regarded in other jurisdictions.”

It was referring to docks and wharves.

Your Honor, the cases which have dealt with contracts involving the use of a dock or a wharf have held that when a city makes a contract with a steamship company allowing that steamship company to land its ships at a wharf that the contract is valid for its term and that the charges and rentals stated in that contract during the term cannot be voided by action of the City. That was the decision of the Ninth Circuit, Your Honor, in *Femmer vs. City of Juneau*. In that case the municipal owner of the wharf entered into an agreement with a steamship company whereby the steamship company would obtain the right to land its ship at the wharf for a five-year period at stipulated rates. Later the validity of the contract was questioned, and the court upheld the validity of the contract and stated this: [442]

“* * * it cannot be said by this court that the contract, the substance of which is that the City in return for a guarantee of a steady and substantial patronage, obligates itself to make certain repairs to the wharf and to give Northland a conditional priority in the right to land its vessels at and use the wharf, is not one reasonably necessary to enable it to exercise its powers to ‘establish and operate’ a public wharf.”

We believe, Your Honor, that the Court may consider the close analogy between these cases and the airport cases. Here, Your Honor, we have a landing place for ships and at an airport we have a landing place for carriers of the air. Both landing

places, Your Honor, are usually operated and maintained by the municipal authorities, by boards of public utilities commissions or boards of port commissions. Both, Your Honor, involve charges to the carriers themselves at stipulated rentals and rates, and both, Your Honor, involve charges and rentals and fees which are not applicable to the individual passengers or members of the public of those carriers.

Your Honor, there is another matter that we believe should be adverted to as a basis for upholding the validity of this lease, and it is this: that a rate making power involves an exercise of the power of sovereignty or the power of government. It is a part of the police power, a part of the [443] power to govern the inhabitants of an area.

This airport is located wholly and entirely without the municipal boundaries of the City and County of San Francisco, and it was stipulated at the trial that the City exercises no true police power at the San Francisco Airport which is located wholly in San Mateo County.

The universal rule is, Your Honor, that a municipality may not exercise any of its governmental powers—powers to govern its inhabitants, which includes the power to regulate rates—beyond its municipal boundaries. That is the purport of the decisions which are cited in our brief in support of that point.

The obvious reason for it, Your Honor, is that chaos in government would result if one county were allowed to project its governmental powers

into the affairs of another county and to assume to exercise any powers of government therein.

Now, Your Honor, we do not mean to be understood by that that this City and County has no power to operate the airport or to manage it. We believe that it quite clearly has that power, but that it has that power not in its governmental capacity or in its capacity to govern its inhabitants, to exercise a police power and to regulate rates, but that it has that power in its proprietary capacity, in its capacity to operate and run a business for the benefit of its [444] inhabitants and others in the County of San Mateo.

That being so, Your Honor, and having exercised its power in that capacity, we believe that this contract is a valid contract and binding both as to land and facilities on the parties.

Your Honor may recall that at the trial of this case much of the testimony concerned weight of planes. That testimony, of course, was pertinent at the trial because of the affirmative defense of the City that there was not at the time this lease was executed any contemplation in the minds of any of the parties to the lease that aircraft in excess of 25,500 pounds gross weight would be put into use at the San Francisco Airport during the term of the lease. The basis of that defense, of course, is an excuse for performance.

In essence, Your Honor, the City by injecting that defense into the case and by raising it, say in effect that "We admit that your lease is wholly valid, but we believe that because you put into use

heavy planes which we did not contemplate and that certain damage was done, that we have an excuse for non-performance.”

So I believe, Your Honor, that we start off in a discussion of that defense on the basis that the City, at least to that extent, must assume that the lease is valid.

I should like briefly to discuss the law with reference [445] to that defense. The common law for centuries of course has been that mere unforeseen difficulty or expense is no excuse for non-performance of a contract. To put it very simply, Your Honor, the law has always regarded a contract as a contract binding on the parties no matter what the expense or difficulty might be after the contract was executed, and the general rule is that mere unforeseen difficulty and expense is no excuse.

There have been, however, Your Honor, a very few cases which apparently are relied on by the City, which state that if there is unusual difficulty and expense of an extreme degree which is (1) unforeseen and not contemplated at the time the contract is executed, and (2) which the parties did not protect themselves against by provision in the contract, that there may be equitable basis or excuse.

There are two cases cited in both briefs by the plaintiff and by the defendant, California cases, which discuss that doctrine, Your Honor. They are *McCulloch vs. Liguori* and *Lloyd vs. Murphy*.

I think it rather remarkable that the City and County would rely on those cases because both of them, Your Honor, refused to apply the doctrine

of commercial frustration, and they refused to apply it on the principles that I have stated: that the difficulty and expense was clearly foreseeable and the parties could have protected themselves by [446] provision in the contract.

Thus, in one case, Your Honor, Lloyd against Murphy, it was a lease of space for the purpose of selling automobiles. The contract was made in 1941—a year before the TWA contract. Then the war came along and there was a restriction on the manufacture of automobiles. And one of the parties to the contract, the lessee, asked to be relieved from the obligation of its contract upon the ground that he didn't have any automobiles to sell. The court pointed out that in 1941 it would not have been difficult for him to foresee that there would be a restriction on the manufacture of automobiles.

Now, similarly, would it have been difficult in 1942, three years after the war had started and when very large planes were in military operation, for this defendant to foresee the use of heavy planes in this area?

I think it perhaps more pertinent than that though, Your Honor, is the statement in these cases which is set out very clearly that if the parties had attempted to protect themselves against the difficulty complained of in the contract, then the defense is of no avail.

I want to call Your Honor's attention specifically to the fact that the lease in this case provides for charges for the use of planes in excess of 25,500

pounds. That provision is Paragraph III, page 6, and it states thus, Your [447] Honor:

“With respect to any scheduled trip departure on which aircraft exceeding 25,500 pounds in standard gross weights are scheduled by the Lessee to be operated, the monthly fee for that schedule trip departure shall be increased by \$1.00 for each 1,000 pounds”—— and then it goes on to provide for further charges for increased weight.

Now, Your Honor, bear in mind that the allegation in this answer and cross-complaint and the defense of the City is based upon the proposition that at the time this lease was executed they had no contemplation of planes in excess of 25,500 pounds. And here is an express provision in the lease itself providing for the use of such planes at the San Francisco Airport.

Moreover, Your Honor, this comes squarely within the principles of the cases which I have cited which state that if the parties had provided in the contract for the difficulty now complained of, commercial frustration is no defense. And here is an express provision for the use of planes in excess of 25,500 pounds in the lease itself.

There is another facet to this defense, and that is whether or not the use of these planes was foreseen at the time the lease was executed. [448]

The allegation in the answer and cross-complaint is that there was no contemplation in the minds of any of the parties. Now who were these parties, Your Honor? As I have stated, the chief negotiator for the City was Mr. Bernard Doolin, who is a man

of thirty years experience in aviation. His testimony was that he did have contemplation of planes in commercial use at the San Francisco Airport in excess of 25,500 pounds.

He stated that he contemplated use of planes at the time the lease was executed of 100,000 pounds or more.

Mr. Andrews was the other party. He was the chief negotiator for TWA. I am talking now, Your Honor, about the two chief negotiators. And he stated that he had contemplation of planes of 100,000 pounds or more coming into use at the San Francisco Airport, and that he discussed this matter with Mr. Doolin, and that, as a result of those discussions, this escalation clause to which I have adverted and which provides for charges for planes in excess of 25,500 pounds, was included in the lease. That is the testimony of the two chief negotiators, one for the City and the other for TWA.

There is documentary evidence, Your Honor, in addition to the testimony in this case which indicates the contemplation of the parties at the time. I refer Your Honor to the letter of Mr. E. G. Cahill dated August 4, 1937. That was [449] more than five years before the lease. Mr. E. G. Cahill was Manager of Utilities in 1937 and he was also Manager of Utilities in 1942. His signature appears upon the lease. This is what he had to say on August 4, 1947; in a letter which is Exhibit 11 in this case and which was directed to the Public Utilities Commission, he stated as follows:

“With regard to the land plane port”—referring

to the airport “—a radical revision is taking place in the design and operation of land type aircraft. Two years ago we were faced with the airport operating problem of aircraft weighing from 17,000 to 20,000 pounds. Today land planes weighing 24,000 are operating in and out of San Francisco Airport and there are now being built land planes to be put in service next year weighing 42,000 pounds with other designs projecting that will weigh close to 70,000 pounds.”

In 1937 the Manager of Utilities was talking about planes in use “next year” weighing 42,000 pounds, and he was stating that other designs would come into use that would weigh 70,000 pounds. That was five years before the lease was executed.

Your Honor, there are also numerous references in the official reports of the Public Utilities Commission which are in evidence in this case three and four and five years before [450] the lease, and indeed as early as 1936, that refer specifically to the use of DC-4 aircraft. DC-4 aircraft is an aircraft weighing over 45,000 pounds and in the vicinity of 50,000 pounds.

There are also numerous references before the execution of this lease to the use of Boeing Stratoliners.

Thus, Your Honor, there is this specific reference in the official report of the Public Utilities Commission to the commercial use of these planes in San Francisco; in Exhibit 9, which is the report of 1938-1939, or about three years before the lease was executed, the following statement appears with

reference to the use of heavy planes by Trans World Airlines and United Air Lines:

“Plans for the use of four-motored planes by the airlines are progressing rapidly. Both of the lines using San Francisco Airport are definitely contemplating this important step.”

Here is a specific reference in an official report of the City and County of San Francisco that both of the lines using the San Francisco Airport at that time, three years before the lease was executed, were definitely contemplating the commercial use of these aircraft at San Francisco Airport.

We have more than testimony and documentary evidence with reference to that. We have the fact adverted to by Mr. Andrews that these Boeing planes which the City states were [451] the heavy planes that caused some damage were actually landed at the San Francisco Airport two years before the lease was executed.

You may recall that Mr. H. B. Andrews stated that he had held a pilot's license since 1914. His log book that he kept for many years showing the places that he had landed and the dates he had landed and the type of equipment landed is in evidence in this proceeding. That log book shows on June 6, 1940 he landed at the San Francisco Airport a Boeing Stratoliner. Six of those planes had been manufactured at the Boeing Aircraft Company in Seattle and were flown down here and landed at San Francisco.

Moreover, Your Honor, Mr. Andrews testified that he had a clear recollection that a few days after

these planes were landed they departed, and that then two of them came back and various officials of the City were given rides in these planes. That again was two years before the lease was executed. And yet, Your Honor, the City states that they had no contemplation that these planes would ever come into commercial use.

The City also, Your Honor, had knowledge of the Constellation. The Constellation is the heaviest plane ever used by TWA.

Mr. Andrews testified that he knew that these Constellations were being manufactured in 1938. He discussed this [452] fact at the time of the lease with Mr. Doolin, and it was contemplated that they would come into commercial use.

Moreover, Your Honor may recall that there is in evidence in this case a photostatic copy of a widely circulated aviation publication, American Aviation. The date of that document, I believe, is May 1941, before the lease. That shows that at that time there were eighty Constellations being manufactured, forty for TWA and forty for Pan American.

In the light of this evidence, Your Honor, it would seem to us strange that the City would insist that it had no knowledge that these planes would come into commercial operation within 20 years after the lease was executed in 1942. Eighty of them were in manufacture two years before the lease was executed.

The City produced as one of its witnesses Mr. Burr, who is a design engineer. Mr. Burr testified

that he left for the Army in 1940, as I recall, and that he did not return to his official duties until 1947. He was thus not engaged in his official duties at any of the times that these operative facts took place or at any of the times that these planes alleged by the City were put in use at the San Francisco Airport.

However, Mr. Burr referred to a report which he stated was published by a group of Army engineers indicating that at the San Francisco Airport runways and taxiways necessary to [453] sustain heavy planes would not be needed for a protracted period after 1937. And that was 1937. As I stated Mr. Burr left his official duties in 1940.

We have in evidence, Your Honor, Exhibit 24, which is a document issued by the Civil Aeronautics Authority. The Civil Aeronautics Authority is a division of the Department of Commerce, and it is charged with the duty of advising airport operators, particularly municipal airport operators, of the need for particular types of runways and to supply them with design information and construction information so that they can keep abreast of the progress of aviation. That document, Your Honor, is dated May 8, 1941. It shows that for Class 4 cities, which are major cities of the United States such as San Francisco, airport designers should contemplate runways that would sustain maximum gross loads with reference to weights of 300,000 pounds. That was in 1941, and that was information issued by the Civil Aeronautics Authority and made available to all municipal airport designers.

It would thus seem, Your Honor, that here we have official information indicating the trend of aviation at that time.

The basis of the City's position is that when we put in use Boeing Stratoliners in 1945—we started them in 1945 at San Francisco—and Constellations in 1946, that due to the use of those heavy planes, these ramps and runways and taxiways were deteriorated and broken up, and that as a result [454] the City spent a great deal of money in the repair and lengthening and improvement of runways.

Your Honor, that was not the reason why the City repaired and lengthened and improved these runways. Your Honor may recall that Mr. Doolin testified that these various facilities were planned at least five years before the funds whereby these facilities were made possible were voted.

Most of the money which was the source of the improvement of runways and ramps and taxiways at the San Francisco Airport was derived from the twenty million dollar bond issue of November 1945. We believe that, in the light of Mr. Doolin's testimony, that planning for those facilities was five years ahead of that bond issue, that it can clearly be seen that the reason for the expenditure of that money was not the breaking up of the ramps and runways by any heavy planes but civic betterment considerations. That must be so because these funds were asked for and were planned long before the utilization by TWA of any heavy planes at the San Francisco Airport.

Moreover, Your Honor, the record shows that in

1943-1944 the first contract for the construction of a runway to take planes up to 120,000 pounds, heavier than the Constellation adverted to by the City and County—that that runway was started in 1943-1944. Your Honor, we did not put into use the Boeing Stratoliner until 1945 and we did not put into [455] use the Constellations until 1946.

The evidence in this case also shows, Exhibit 17, that on December 11, 1944 the Public Utilities Commission wrote a letter to the Board of Supervisors asking the Board to sponsor a twenty million dollar bond issue. Your Honor, that was before the utilization of any heavy planes by TWA at the San Francisco Airport.

It would thus clearly appear that the reason for the extension and improvement of the San Francisco Airport was a thoroughly laudable desire to better the airport and to improve it for civic betterment considerations, and not because of the deterioration due to any heavy planes.

Also, Your Honor, with reference to that defense, I think this might be said: that it was not the use by TWA planes that caused any breakup or deterioration to any great extent.

Your Honor may recall the testimony of Mr. Burr, and of Mr. Messersmith, as I recall, that they did not believe that light or intermittent use by heavy planes on runways would have any material or damaging effect.

What does the evidence in this case show with reference to the use by TWA of heavy planes? Exhibit 1 in this case, Your Honor, shows that during

the entire time that TWA utilized Boeing Stratoliners at the San Francisco Airport they never at any time utilized them more than two schedules a day. That means two landings and two takeoffs a day. [456] Similarly, when Constellations were put into use, those Constellations were operated for almost a year after 1946 on a one schedule a day basis. That is one landing and one takeoff. And I believe there was only one month during the period in question here that they operated on a three schedule basis of more than three landings and three takeoffs a day.

The Court: We will take a recess.

(Thereupon a short recess was taken.) [457]

Mr. Dyer: Your Honor, at recess I was discussing the fact that there never was any heavy use of runways and taxi-ways by TWA planes at the time this damage was alleged to have occurred. I might point out to your Honor that before the utilization of any heavy planes, that is, planes over 25,500 pounds, at the San Francisco Airport by TWA, and in 1943 and 1944, there were over 1,000 trans-Pacific flights initiated at San Francisco with four-motored equipment weighing in the neighborhood of 50,000 pounds.

They were utilized in military service. The point was made at the trial that those planes, when they took off from the San Francisco Airport, were not fully loaded; that they took off from San Francisco and went to Hamilton Field, I believe it was, and then went on their journey across the Pacific.

I think that is correct. But the point to be made

is this, that these planes, without a full load, as I recall, weighed in the neighborhood of 50,000 pounds. And, your Honor, one year before we utilized the Boeing Stratoliner at the San Francisco Airport there were over 1,000 of these flights initiated with equipment of that weight at that airport.

Now, your Honor, as I have stated, it is the position of TWA that the lease hereon is not a rate contract, and that the rental and charges are neither applicable to nor paid by [458] the individual inhabitants of San Francisco or any members of the public, and that therefore the lease is a valid document. But even assuming—certainly without conceding that these are rates—we believe that the City had power by contract to agree to fix them for a definite term.

There is a line of cases, Supreme Court cases, that hold that where the City has the power to fix rates by action of the Public Utilities Commission, and also has power to fix rates by contract, if it elects to fix rates by contract, that that contract and the rates so fixed are binding during the contract terms.

There is the Home Telegraph against Los Angeles case. I might fairly state to your Honor that in that case it was held that the City of Los Angeles at that time did not have such power. But therein the Supreme Court decided this principle, and that is the important thing. It said,

“It has been settled by this Court that the State may authorize one of its municipal corporations to establish by an unviolable contract the rates to be charged by a public service corporation or natural

person for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of a contract the governmental power of fixing and regulating rates."

This principle was also affirmed in Public Service Co., against McCleod, again a Supreme Court of the United States case, and it is held therein that if the municipality exercises the power to contract, the power to regulate the rates during the period of the contract is thereby suspended and the contract is valid.

Now, those cases contain the proviso, however, that express authority for such contract or such lease must appear. We have pointed out to your Honor that the Municipal and County Airport law of 1927 expressly gives a municipal such as the City and County of San Francisco power to lease facilities at the airport. We believe this statute and other statutes cited in our brief constitute a source of power to the City to fix rates by agreement. And our position thus is that even in the event the Court was of the view that rates are involved, the City nevertheless had power to enter into this contract, and that it is bound by the obligations contained therein during its term.

With reference to the matters adverted to by the City in the cross-complaint, may I say this: It seeks to recover back rates. Now, your Honor, the principle is universal that before a particular rate, whether that rate is contained in a contract or otherwise, can be changed and raised, that that particular rate payer who holds that contract must have notice

form the Public Utilities Commission that that particular rate [460] is deemed unreasonable, and, if required, a hearing must be held, and the opinions can be heard against it and findings made thereon.

Now, your Honor, when the 1946 schedule was put into effect, put into use, the rate schedule, and when the 1951 rate schedule, there was a general promulgation by the Public Utilities Commission. There never has been any specific notice to this specific airline that the charges in its contracts were deemed unreasonable. And there never has been any hearing held concerning the reasonableness or unreasonableness of those charges, or any findings made.

The cases cited in our brief are clear that on constitutional grounds opportunity must be given, and if that opportunity is not given the rate is presumed valid until so changed. And until such an opportunity is given no recovery can be had for those back rates.

Finally, may we say this, your Honor, that we believe that this case should be looked at on the basis that here we have a contract fairly open, fairly entered into after long reflection and negotiations by the City and the airline. We believe that this contract was pursuant to the powers of the City to operate and to manage an airport.

We believe that if we did not have a City in this case, that if we had a private airport operator, that there would be no question of the validity of this lease. And we do not believe that a City and County, under the guise of a rate-fixing power, should be

allowed unilaterally and at will to increase the rentals and charges which it fairly entered into by way of contract.

Mr. Holm: If your Honor please, I regret very much that Mr. Thomson who tried this case will not be addressing you this morning, as I feel certain he would have been able to do it far more efficaciously than I. Unfortunately, as you are aware, the Lord saw fit to take Mr. Thomson from our midst since he tried this case, and I will do my best.

I may say that I have studied all pleadings and every word of the evidence in the transcript and I have likewise examined all the briefs that have been submitted and studied them carefully.

Now, this case is probably one of first impression. There isn't anything in the United States that we have been able to find that is directly analogous to the facts that are presented to your Honor in this litigation.

Thus, we have to now view it from the standpoint of the City and County in this proceeding. What do we have? We have a municipality created under the laws of the State of California, given its sovereign powers, and has adopted a home rule provision of the constitution, that is a law unto itself, went into the legislature upon municipal affairs, and there are state laws to that effect. [462]

And we are presented with a picture in 1942 that when at that time the City and County of San Francisco had invested approximately \$3,000,000 of the taxpayer's money for the purpose of acquiring an airport in San Mateo County. The work had

begun earlier than that—began in 1927. I had a hand in the acquisition of it, of the first thousand acres of the land in that airport, acquired under difficulties, as to whether the law even permitted you at that time to condemn for airport purposes or not.

We were successful in acquiring it, and little by little land has been acquired since that time until we have close on to 4,000 acres of very valuable industrial land.

To make it an airport it was required to spend a tremendous amount of money. There was the question of tidelands, swamp and overflow lands was present. We had to fill in. It cost millions of dollars to do it.

Contracting the situation of the roughly thousand acres in 1942 with the present day situation of about \$4,000, and the \$3,000,000 that was invested at that time of the taxpayer's money, we now have, as the record discloses, approximately \$40,000,000 of the taxpayer's money in this project.

And for what?

This is largely addressed, this declaratory judgment of your Honor, to the equity side of the court, to use that expression. And what are the facts?

The whole burden of making an airport possible, and for the very plaintiff in this action and for the 12 other carriers who use the airport facilities, plus the commercial concerns that use it and the private individuals, the private corporations, they have expended, insofar as the airport proper is concerned, and its facilities, for accepting travelers from all

over the world, not merely limited to inhabitants of the City and County of San Francisco, not so much as a thin dime. San Francisco has stepped in and has provided these carriers with the facilities that make it possible for them to conduct their business from a very fruitful source of obtaining business.

You know the injustice of the situation. When we look at it on an equitable way, I think you can sort of parallel it with what exists in railroad transportation. I have yet to find where the railroad companies themselves have not been investing their own capital in providing facilities that cost untold millions of dollars to accommodate the passengers that they desire to transport wherever their roads or connecting lines may go.

Similarly to our situation at the Airport of San Francisco, now located in San Mateo County, they engage in separate enterprises at those stations. Comment has been made in the brief, possibly by counsel this morning, that you engage in many businesses there. That is true. So do the railroad [464] companies. Their stations have all manner and kinds of concessions that are leased out — restaurants, cigar stands, magazine stands. They deal in general merchandise similarly as we do at the San Francisco Airport, and will do with the tremendous new building that is under construction there now, costing the city approximately \$10,000,000.

But unlike the air carriers, the railroad companies themselves have provided those facilities and have put their own capital into investment in them; and when they fix the rate of return that they are

to earn on their invested capital they consider that as part of a rate base on which they are entitled to earn a fair return.

Strictly speaking, that has nothing to do with the taking of a person from one point in the country to another, so far as transportation itself is concerned, but it is a facility that is an integral part and it is necessary to do that.

Likewise, you take the telephone building here in San Francisco. Counsel's firm is now engaged in litigation before the Public Utilities Commission of the State of California, going on today—or it was at least yesterday. I think it is recessed today—and very definitely that 'phone building, a magnificent structure in this city, has not one thing to do with telephony as such. In other words, I mean that it hasn't a thing to do with when you call a number or dial a number and want to have a connection made. Not a thing of that is in the [465] Telephone Company building. It is all occupied by executives and administrators from the company.

Nevertheless, every cent of capital that the company has invested in that Telephone Company building it includes in its rate base and demands, and rightfully demands under the laws of our nation that it be given a fair return.

Now, there is quite a similarity to the cities there that these operating companies like railroad companies, they bear all the expense of it. But, on the other hand, we have plaintiff in this action that hasn't contributed a five cent piece for these facilities under consideration by this Court. The City

has contributed them, and has done so for the purpose of accommodating not the inhabitants of San Francisco alone, as is obvious from the very nature of the business in which plaintiff is engaged. It brings people from all over the world.

Now, the lease of 1942—and designated properly as a “lease”. Nevertheless, when the Court looks upon it, it has to view it, pick it up from its all four corners and construe it as well as may be done with legal precedence in mind.

What was the situation in 1942? True, Mr. Doolin, Mr. Andrews and others discussed the possibility that there were planes that were going to exceed the weight of 25,500 pounds. Yes, that was discussed. They even said that there were some Army planes that were much heavier than that and were almost a [466] reality as of 1942 when this lease was entered into, and that there was thought of things being constructed of far greater tonnage than that.

They had a saying in the early days of aviation that—especially when San Francisco pioneered in acquiring this airport—among the flyers. There were no instruments. It was crude. They used the sun. They used the sextant. They used the compass. And largely they used the expression, the inelegant expression, that they flew by the seat of their pants.

Now, that’s how crude the industry was when San Francisco began. And that’s the situation that confronted us then. It confronted us in 1942. Things that could not be contemplated within the fair projection of a man’s mind, could not be in anyway

considered as actualities in 1942 as to what has actually developed today.

And where are we today? Now we get word within the last week that a plane has done the almost unbelievable thing. If anybody had said this in our youth, that a plane would be constructed and it would travel as fast as sound, he would be looked upon as very much of a queer individual, indeed, and a novelty.

And what has happened since then, since last year? Just within the last few weeks, and while this question was pending, there has been a plane that has traveled twice as [467] fast as sound.

And what are we confronted with today? We are confronted with the thought that in the future there may be planes that will be 300,000 pounds in weight, that will want to take off and land at the San Francisco Airport. We can't conceive that right at this time. Certainly no facilities at the San Francisco Airport today are adequate to accommodate such a plane as has been described.

We have another feature in the industry to show just how changing this thing may be—not only in 1942 when this lease was entered into, but as of today. We read about their harnessing nuclear power, to put those into airplanes. And what the effect of that is going to be.—They are going to put them in such a way, they say they are going to be able to circumnavigate the world three times without stopping. The thing is almost unbelievable.

And on the other hand we have the navy comes in and makes the extraordinary statement that per-

haps there is no need for any land planes any more, that they are developing water planes to such an extent that they will take the place of every land plane that is considered, that is in operation now or considered in the future, and will outfly and outlift anything that has been designed for land use.

The industry in short, your Honor, not only in 1942 was in a much worse state of turmoil than today, but it is even [468] as of today in a terrible state. Nobody knows what the future is going to be.

Now, when I call those facts to your Honor's attention, it is quite understandable how in 1942 when this lease was entered into, that, yes, consideration was given, as is stated in the transcript to the possible development of heavier planes than the 25,500 pound that was then in use for commercial purposes and in use by plaintiff in this action. But nobody attached too much significance to the thought that they were to be in general use and accepted by the industry in general. But it was developed beyond the concept of anybody in 1942 that could have been expected of him, when this contract was—when this lease was entered into.

Now, here is something that I introduced this morning, if your Honor please, and that is Defendant's Exhibit R and R-1, 2, 3 and 4, with the succeeding numbers. That exhibit if your Honor please, is the mechanics that were gone through by the Public Utilities Commission in the year 1941 in setting rates and charges for all carriers who were using the San Francisco Airport.

It might be well to call your Honor's attention

at this point to the provisions of Section 130 of the Charter of the City and County of San Francisco, which, as your Honor well knows, is given the sanctity under constitutional provision and under legislative action as it has been ratified by the [469] State Legislature, or has the dignity, or transcends the dignity, I should say, of the ordinary State Statute in the sense that it becomes the constitution of the City and County of San Francisco.

Section 130 of that Charter recites, referring to the powers of the Public Utilities Commission:

“The Commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of services by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers; and to settle and adjust claims arising out of the operation of the said utilities.

“Rates may be fixed at varying scales for different classes of service or consumption. The Commission may provide for the rendition of utility services outside the limits of the City and County, and the rates to be charged therefor, which may include proportionate compensation for interest during the construction of the utility rendering such service.

“Before adopting or revising any schedule of rates or fares, the Commission shall publish in the official newspaper of the City and County for [470] five days notice of its intention so to do, and shall fix a time for a public hearing or hearings, which hearings thereon shall be not less than 10 days after the last publication of said notice, and at which

any resident may present his objection to or views on the proposed schedule or rates, fares or charges."

Without boring you with reading the rest of the section thereafter, it is provided that after the public hearing has been held by the Public Utilities Commission, the schedule of rates and charges must then be submitted to the Board of Supervisors, who must either approve or disapprove, and it states the number of votes required, and if they don't act on it within 30 days of that time, it then becomes the established rate and schedule.

My purpose in bringing Exhibits R, S and T in this morning and having them introduced, the "R" group covers the fixation of the rates and charges fixed under Section 130 of the Charter by the Public Utilities Commission—which, incidentally, under another section of the Charter is given full control, management of the operation, and development of the airport as well as the other utilities that the City owns.

It first of all, as the exhibits will show, passed its resolution of intention to consider the increase in rates of [471] 1941; directed the Clerk of the Commission to publish notice for the requisite time, as shown in this Exhibit R that was done. A date was set in that notice of hearing in the publication in the official newspaper of when it was to be heard. The hearing was held after the published notice. It was then determined what the schedules were. The schedules were under this Exhibit R for the year 1941. And thereafter it was sent to the Board of Supervisors who confirmed it.

The interesting part about that, Your Honor, is this: That the precise wording as set out in the rates and schedules as determined by the Public Utilities Commission and authorized by the Board of Supervisors are written into the lease that is before Your Honor for contemplation and construction now. They don't change. They are not changed in any respect at all from what the Public Utilities Commission did.

Similarly, in 1946, as Exhibit S and the other numbered pages in it will show, a like procedure was carried out as I have described as in the first instance in 1941.

And again the documents are there showing the procedure that was carried out. The publication, hearing held in 1950 by the Public Utilities Commission, and the action taken by the Board of Supervisors.

I am taking this thing, maybe, the wrong way too, but counsel in his argument has said that there was no notice given to his carrier and his plaintiff in this action that these [472] hearings were to be held. The City has complied with every provision in the Charter, as is shown by this group of exhibits I have given you, and complied with what it is required to do, and it is required to do nothing other. And of course the fact of the hearings to be heard and the rates that were going to be contemplated were made a matter of construction—matter of discussion—obvious that it was, among all the carriers as well as the City before the matter was ever brought before the Public Utilities Com-

mission in conformity with the formal notice that it gave in accordance with the law that governs this situation.

So I thought it might be well to dispose of that problem right off the reel, and I think it is, and the record bears us out completely on that.

Now, of course we have this sad picture to call to Your Honor's attention, and that is, in the transcript I remember reading Your Honor's comment at the time, that apart from the capital investment that the taxpayers of San Francisco have made in this airport, they have been confronted with a \$650,000 loss of operation for the fiscal year 1952-1953, which is the last figures that are complete and presented to Your Honor. \$650,000 loss in just maintaining and operating of the airport itself.

The picture is even grimmer than that. And I thing Your Honor likewise pointed out in the transcript the grimness of [473] it when you asked the question to the effect, "Did that include the payment of the bond interest and redemption of bonds?"

The answer given you wasn't sufficiently complete. It did not, Your Honor, include that.

For the current fiscal year of 1952-1953, in addition to what I have explained in the way of loss in operating, just keeping the thing going, out-of-pocket cost or loss, the interest and the retirement of bonds has cost the taxpayers \$2,130,000.

For what? To allow 12 chartered carriers of airplanes to use the facilities of San Francisco. And

they have the temerity to come before the Court and ask for equity, from their viewpoint, that they are being charged rates and schedules to which they object, and wish to keep frozen in a lease—a situation that they know is wholly inequitable in view of the circumstances of the development of this industry; and when it was likewise known that the City and County and those responsible for the formation of the terms of that contract had no knowledge of what these development might be.

And all these monies in this tremendous \$40,000,000 not expended for the inhabitants of San Francisco. Surely they reap a benefit from it. The people here naturally have the advantage of going to a well conducted airport. That is very fruitful from a business standpoint for all the carriers. They have the advantage of going to that. But they are not the only ones. Everybody that travels throughout the nation and [474] comes to San Francisco, they likewise have the privilege of it.

Now, it seems to me almost—it's a horrible word to use, but it seems there's a hypocrisy in the thing.

When these carriers, and this plaintiff particularly who instituted this suit, when they come before a court of equity and say that they shouldn't pay a fair or just schedule of rates that has been set up by the authorities under constituted law; that they shouldn't be called upon to pay that because they have a contract that they believe should be susceptible of an interpretation that they are trying to put on it, that is strange, and it should

not stand up as a matter of equity in this or any other court.

They say that they should be entitled to those frozen amounts that were specified in 1942. Well, now, it doesn't mean a thing to them, as a matter of fact. They claim that the people who use the facilities really are not the people of the world at large but they are the inhabitants of San Francisco. That is ridiculous to maintain that from the very nature of the business.

Plus the fact that whatever landing fees or take-off fees—and there is only one charge for the two operations—coming in and getting out, we only charge them once for that fee, or to do that.

And by the way, it is obvious when our rates are fixed by [475] the CAA and CAB, they figure in what is the the charge that they must pay to the San Francisco Airport for landing and take-off charges, and that is included in the very ticket and the cost of that that this man from anyplace throughout the United States may come into and use the facilities in San Mateo County.

We are part and parcel, with the argument before Your Honor that we are not a utility down there, seems to me wholly falacious. Let us approach this matter from this viewpoint for a moment, and let's simplify the thing to this extent:

I am here not so much concerned as to the relatively few dollars that are presently involved before the Court, but we are concerned very much about the principle and with the things that may happen for the many years to come. This is not the only

carrier involved. We have another suit pending here that has not reached the stage yet of this action, but the City instituted that suit against the United Airlines and it is in the files here of the court now and will be litigated and carried on, but this was instituted by the carrier itself.

Let's for the purposes of this case forget anything about the area in the Terminal Building. Let's forget about parking space. Let's even forget about tank farms or anything of that sort and let's just consider the area that goes—well, let's take this podium, or whatever we want to call it here to be the end of the City's properties before we get out onto the field itself. Then we come upon aprons, as they call them, or [476] loading zones, taxiways, and finally the runways on which these airplanes take off.

Now, those are all facilities that are used in common with all the other carriers. And those are the facilities, to shorten this case and to give Your Honor an easier way of approaching this already complex problem, of determining, does the City and County—and I think Your Honor stated this in the transcript, that that seemed to be the crux of this case,—does the City and County of San Francisco have a right to fix schedules and rates of charges for those common facilities of the loading zones, the taxiways and the runways, and fix them from year to year in view of this particular plaintiff having a contract or lease that says their rates shall be fixed in accordance with the 1941 rates and charges.

And I think that will simplify the situation very well. That where a common carrier—that where a utility and a part of the common carrier, no different from this railroad company with its railroad station, if anybody is injured there, certainly the railroad company within its own properties would be held liable. If the City and County of San Francisco or one of the carriers, I should say, there at the airport happened to have a patron, one of their passengers, from the time they left this administration building, went out to the apron or loading zone, something happened to that passenger, he tripped or fell or was injured, just as sure as we are in this courtroom [477] this morning that passenger wouldn't be suing TWA, but they would be suing the TWA and the City and County of San Francisco, for any dangerous, defective condition of that approach to the plane.

And further than that, when that passenger gets into the plane and they have sealed him off and are ready to start off, they taxi over to the runways. Now there's a person boards it there to use the facilities of the City and County of San Francisco. It's out there on this taxiway now. The motor is going. They are proceeding along the taxiway to the runway, and something happens, and there is an obstruction in the concrete, taxiway, or something might happen that they went off the side of it, and a hundred and one things that could happen. Just as sure as we are in this courtroom, we in the City and County of San Francisco would be in on that situation and we would be named a party de-

fendant and would be held jointly liable as a joint tort seizure.

And the same thing would happen with that plane as it gets out on the runways, and before it leaves the ground itself. Anything that happened on those 8,900 feet of runway, if they were using that particular runway, the City and County of San Francisco would be a joint tort seizure under those conditions.

Yet plaintiff tries to say we are not operating a utility insofar as common utilities are concerned. I think [478] that clearly illustrates, should illustrate, Your Honor, that it is in fact a utility.

That being so, the City has followed out from the exhibits you have had brought to your attention this morning what is required to fix the rates and charges. And then we will get into the proposition of saying, once having entered into the terms of the lease, may then the City change those terms by these subsequent charges and rates that are fixed up in the rate schedules? And we will come to that.

I will try to follow as much as I can counsel's argument this morning. He followed more or less, I think, the order of his brief.

Those cases in the first part of the first section of his brief all go to the proposition——

May I ask Your Honor what your pleasure is?

The Court: We will take an adjournment until 2:00 o'clock.

(Thereupon this cause was adjourned to the hour of 2:00 p.m. this date.) [479]

Mr. Holm: If the Court please, I did not realize

that I had taken so much time this morning trying to develop that whatever equities exist in this case in the Court's interpretation of the documents should be in favor of the City because of all the circumstances—the money invested by the City, the conditions under which it was invested; and then the second point that we are in fact conducting this airport as a utility.

One of the corollaries of a utility is that there must be regulation of it to a certain extent somewhere along the line, and by the actions of the United States Government through which the Department of Commerce as represented by the Administrator of Civil Aeronautics, the San Francisco Airport does in a sense become regulated as a utility. As an example of that, I call your Honor's attention to an order; it is called a Technical Standard Order, entitled TSO-NC6-A, and the subject of it is "Runway Strength and Dimensional Standards for Air Carrier Operation." It reads in part:

"In order to obtain better correlation between the design of airports and the design of aircraft which are to be used in the air carrier operations and design standards contained therein have been [480] developed by the Civil Aeronautics Administration."

And then it goes on to say what the purpose of it is: It is to be a guide and the norm by which airports are to be constructed. And the various airports throughout the nation are listed as feeders, trunk lines, express and continental and intercontinental, and intercontinental express. And in that last category the Civil Aeronautics Administrator

dictates that to reach those requirements, a public utility, as the airport is, must have a runway of at least 8,400 feet—your transcript shows that San Francisco Airport exceeds that—a width of 200 feet—we show that we have that in the transcript—and a taxiway width of a hundred feet, and that is likewise met in our structure at San Mateo County. And with that they permit dual wheels with a pavement loading of 125,000 pounds.

So if we did not have those facilities that have been specified as I have read from the Administrator of Civil Aeronautics in his formal order, this plane would not be permitted, or any similar to him, to use the facilities of the San Francisco Airport.

So in a sense, to have them there, we are regulated by the rules and regulations of the CAB—Civil Aeronautics Board—and the CAA—Civil Aeronautics Authority, and we must live up to them if we care to continue in business.

I will try to be as brief as I can to pick up counsel's [481] argument of this morning. He followed the order of his brief.

In Section 1 of his brief he quoted cases and tried to establish the right of the City to lease airport property. We have no quarrel with that at all. We agree to the statement and to the cases that he has in there. It is a very lawyer-like preparation and done well. He sets out the cases in very good order and we have no quarrel with it. It is quite in conformity with what we believe is the law.

But he makes reference to the Municipal County

Airport Law, statutes of 1947, Chapter 267, page 487, Deerings General Laws of the State of California. But he forgot to emphasize this language here: that when the State act permits a municipality to acquire an airport outside of its confines or geographical limits, it also entitles them, quoting from the Act, "to require payment of charges, fees and tolls together with liens to enforce payment."

Counsel has referred on his first point to the case of *Pipes vs. Hilderbrand*, 110 Cal App 2nd 645. This involved a writ of mandate to compel the Commissioner of Finance of the City of Fresno to issue a warrant for the first installment of payment of a contract of work to erect a hangar at the Fresno Air Terminal. We have no quarrel with that at all. Of course we say the City has a right to do that in its capacity as a municipality.

And the same about *Laurent vs. City and County of San [482] Francisco*—I tried that case in the court below. And there again that has nothing to do with the leasing of common facilities such as I described, that go beyond the barrier of the actual physical properties, as of course a terminal building and those things that are used in conjunction with it. And I have no quarrel with that, naturally, as we prevailed in that case.

But again, that has nothing to do with these properties that are used in common with all the other carriers, which are, I believe, 12 in number in addition to the plaintiff in this case, and there is a Japanese line and some other foreign line about to come into San Francisco.

And then they would be confronted, Your Honor, with this situation that outside of the three carriers that I believe I mentioned this morning, all other carriers would be paying discriminatory rates, which is a violation of every concept of any rate schedule that has ever been put into effect. It is all supposed to be based upon a uniformity of rates and no differential to be given or preference given to anybody who is using the utility. That is the fundamental law that goes from the Supreme Court down to our lowest court of rate making and how it should be established.

And here, by a court lending itself to the interpretation which the plaintiff seeks, you would be destroying that very fundamental of rate making which would upset and allow [483] discrimination to exist among the carriers and give three carriers a preferential rate in their business activities over all the others. That is not a concept legally to be tolerated nor is it equitable in any sense at all.

Section 2 of the plaintiff's brief has to do with the airport operated and administered by the Public Utilities Commission and it acts in a proprietary capacity; that agreements made by the Commission are governed by the rules of law applicable to private corporations. Well in the main, we have no quarrel with that point. We can adopt that point as they state it. But in any of the cases that counsel refers to in his brief on that point, he has yet to point out a case where they were common use facilities such as the apron, the taxiway and the runway

at an airport, or anything that could be construed as an analogous situation.

Ex Parte Houston I think is one of his cases, 224 Pacific 2nd, 281. It involved the validity of a contract with an airport limousine service for an exclusive concession to pick up and deliver passengers to and from space in the terminal building and the paving area. Those are all things that we say are susceptible to lease.

Another case that he laid emphasis upon was Pignet vs. City of Santa Monica, 29 Cal App 2d 286, which involved an accident at Clover Field, an Airport owned by the City of Santa Monica. And it was held that the City operated the [484] field in a proprietary capacity and "as such was liable like and only like any other individual for damages and injuries caused by its negligence."

To the same effect was the Miami Beach Airline Service vs. Crandon in counsel's brief. An exclusive concession was given to a transport company to convey passengers back and forth. Again, it is not a common facility such as I have described.

The same may be said of Milwaukee County vs. Town of Lake, 48 Northwestern 2nd, page 1. [485]

Again, that was not a common facility where they leased merely a hangar and a strip of land close by it. It is not these parts of utilities that are leased as common utilities used by all of these other carriers in conjunction with plaintiff in this case.

The Milwaukee case was one that was given considerable space in counsel's brief.

The next one was Arkansas Valley Company vs.

Morgan at 229 Southwestern 2nd. The same thing applies there. A building known as Building No. 19 and a contiguous strip of land was leased. Again that is not property or facilities that are used in common with others.

In Section III of the brief—and we are making progress, Your Honor—plaintiff comments on the analogy between wharves and airports. He quotes from the case of *Coleman vs. City of Oakland*. This case involved an action for personal injuries allegedly caused by a motor truck operated by defendant City of Oakland at the Municipal Airport. He quotes at length from this case, but it is very significant that in his quotation from this case on page 22 of his brief that he leaves out a highly important quotation that would apply and substantiate the position we have taken in this case. And I am going to read the few lines that he omitted before he began quoting. His quotation is from *Coleman vs. City of Oakland*, 110 Cal App, 715. That is to be found on page 23, line 10 of his brief, [486] and he quotes this language:

“Its nearest analogy is perhaps found in docks and wharves. ‘An airport with its beacons, landing fields, runways and hangars, is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those that navigate the air.’”

And then he goes on and quotes some citations, but that is the end of the quote. But just preceding that in that opinion, which counsel very properly

from his own standpoint failed to incorporate, is this very prophetic language, and I am quoting it verbatim. It is on page 720:

“We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally into the same classification as such public utilities as electric light, gas, water and transportation systems which are universally classed as proprietary.

That, I think, while it is dicta to the determination of that case, nonetheless is quite indicative of counsel's carefulness in avoiding bringing anything of that to the Court's attention, which I believe is the only language that has been used in any California case to actually and specifically state that an airport is a public utility. [487]

That being so, of course the thing obviously follows that if it is a utility we have under our Charter the right to regulate rates.

Another case that counsel emphasized in his brief under this point was *Femmer vs. the City of Juneau*, 97 Fed 2nd, 694. There is language in the case which indicates that rates for wharfage may be fixed by contract by a municipality which owns a municipal pier. But the lease involved in that case, however,—plaintiff doesn't mention this either—fixed a set price for each boat to approach the wharf using the Juneau pier, but rates for dockage or wharfage were fixed by schedule, which is about the situation that we have here.

And again the only other case that he cites on the point would be *MacNeil vs. Chicago Park Dis-*

trict, 82 Northeastern 2nd, 452. That is a case that held that a dock fee set by the Park District of Chicago was valid for vessels which moored within its jurisdiction even though Lake Michigan is considered navigable waters and cannot be burdened by local regulations. There is nothing in that case but a contract under which the matter of fees is set by lease. So the case does not apply and is no help to plaintiff.

I reluctantly bring attention to a case which Your Honor sat in in this court, in a Three Judge Court, *The State of California vs. United States of America* which involved dockage fees which the Maritime Commission charged back there, I guess [488] it was during the war times. And there again it substantiates the very theories that I have suggested here. The citation of that case is *State of California vs. United States of America*, 321 US 576. That case inferentially sustains just the position that I am taking here: That we have the right to fix fees for the use of the facilities such as has been done here.

The Court: I am not conscious of that case. Will you elaborate a little more.

Mr. Holm: Let me see if I can remember some of the facts. It was a case that involved the United States Maritime Commission and you, I think, and Judge Healy—I think Judge Healy was the one who wrote the opinion—and another Judge I don't remember now—sat as a Three Judge Court. The case involved the right of the United States Maritime Commission to make an order requiring water-

front terminals to desist from unreasonable allowance of free time during which time cargo may rest on the wharf without charge against public owners of wharves and piers. The Supreme Court upheld the decision of the District Court that such order was valid. Does that bring it back a little bit to Your Honor now concerning public owned docks?

The Court: Yes, but I don't see how it enters into our problem here.

Mr. Holm: Let's read this little excerpt from it.

"Through its Board of State Harbor Commissioners, [489] California provides facilities for the handling of freight and passengers on the San Francisco waterfront, under a statute which prohibits the Board from making charges beyond the cost of furnishing such facilities and administering them. California Harbors and Navigation Code is the citation. Pier and office space is assigned by the Board to various steamship lines, and charges fixed by the Board are collected by these assignees for the Board. Except at two piers, the assignees handle the cargo, but the Board employs a staff of men to check all cargo and vessel movements and collect its charges. Oakland, through its Board of Port Commissioners, operates piers and terminals which like those of California, are designed to accommodate vessels in coastwise, intercoastal, off-shore, and foreign trade. Whether the facilities are operated by the City directly or leased to another, the City prescribes and collects the charges."

That is the point that I am trying to bring out here: That there the City really prescribed by rates

what the charge is to be and actually was collecting them, such as it does here: The City prescribes them through the action of the Public Utilities Commission confirmed by the Board of Supervisors and [490] collects them.

Another case of interest is the City of Oakland vs. Eldorado Company, 41 Cal App 2nd, 320. There, the company maintained a public wharf, and the Court stated as follows, at page 325 of the opinion:

“If the property involved is held for public use, but is usable by the public generally, with a charge, such as a toll paid for such use, it comes within the classification of a public utility and permission, generally in the form of a franchise from governmental authority, is necessary. The operation of this wharf, and the taking of tolls, as appears from the stipulate facts, brings it within the category of a public utility.”

That is rather cumulative of what I have said this morning in trying to emphasize that we are in fact a public utility.

Section IV of Plaintiff's brief is entitled “The Airport is Located Wholly Without the Municipal Boundaries of San Francisco.” And it is said that a municipality may not exercise anything in the way of police power beyond its geographical limits. Counsel, during the course of the trial, as I read the transcript, seemed to lay emphasis upon the fact that San Francisco in any of its properties located in San Mateo County may not make an arrest and seems to give that as an example that that was the exercise of police power. That is [491]

not the concept of police powers as we consider them under the constitution. Counsel is quite right in that situation, and I had to evolve that situation in which our employees in San Francisco who acted as guards at the San Francisco Airport would be deputized as deputy sheriffs of San Mateo County and consequently could make an arrest if it were necessary to preserve order, which is wholly necessary when you are handling three and a half million people a year.

The police powers go way beyond that, and rate making is one of the police powers that is conferred upon a municipality.

I believe counsel quoted from *South Pasadena vs. Terminal Railway Company* in 109 California 319. But that case really has no bearing on this situation here and I don't know why it was included in the brief excepting that it did go on the question of the right to fix rates and probably redounds to our benefit because it upholds the right to fix rates and street railway fares from one community to another, between South Pasadena and Los Angeles, and that in effect gives the authority that there are extra territorial rights that inhere in a municipality when they operate a utility outside of the confines of the municipality. Your Honor is very familiar with that. You have had the celebrated *Pacific Gas & Electric Company* under your tender mercies for a good many years, against the City, where power was involved and its companion [492] of water distribution. And obviously there you knew how it was necessary that San Francisco do estab-

lish its rates, especially when it delivers water outside its geographical limits, and how necessary that was. I will not say what the ultimate ruling was on that case; it is too well known to your Honor and to me. However, that is part of it. And of course it would be preposterous to assume that the state law which says that you may build an airport in Siskiyou County, period. What would be the sense of that, unless, inferentially you were given the right that you could impose fees for common facilities that naturally flow from it.

In addition to that, of course we have in our own charter a provision under Section 130 that we must establish fees for the use of these utilities. And I emphasized that, I think, more in detail this morning.

There is a case of *Ebrite vs. Crawford*, 215 California 724. That was decided in 1932. That case involved a collision between two airplanes at the Long Beach Municipal Airport and the plaintiff sued the defendant for personal injuries and property damage.

There was an objection on appeal to certain instructions, and the respondent justified the instructions on the ground that they were the substance of an ordinance of the City of Long Beach which provided for a right of way and other rules for the operation of the aircraft. Appellant relied on this [493] contention: that the accident occurred outside the city limits of Long Beach, the easterly city limits being westerly of the point of a narrow portion of the field where the machines collided.

Well, it is not too long; I will read just a short excerpt from that case at page 7 to 8:

"This argument of appellant cannot be sustained for the reason that the City of Long Beach had extraterritorial power necessary to regular and lay down rules governing the use of the municipally-owned airport, lying partly within and partly without the City. By act of the Legislature approved April 28, 1927,—" the very act that counsel has referred to, "—California municipalities were authorized and empowered to purchase, lease or otherwise acquire lands for and to operate airports or flying fields and in connection therewith 'to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport'. In addition to the implication which necessarily flows from the quoted language of the statute it should be observed as is said by the Supreme Court in *In Re Blois*, 179 Cal 291: '* * * Municipalities may exercise certain extraterritorial powers when [494] the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality.' And it requires no great meditation to realize how strange an anomaly it would be to say that the City might own an airport adjoining its boundaries and yet be without the power to regulate the manner of its use. For other statements of the right of the City to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs—" and then it goes on to some other cases.

Section 5 of Plaintiff's brief is entitled that "the City has the power to fix public utility rates by agreement for a definite term, and the rates so fixed cannot be increased during that term." Well, that of course goes to the essence of what is provided in the 1942 lease. The rates in the 1942 lease, as I told Your Honor this morning, verified by Defendant's Exhibit R in this case, are strictly in conformity with the rates and schedule of charges for these common properties that are used by all other carriers and are incorporated right in the 1942 lease. Of course that is sufficient notice, I should think, to put the plaintiff on complete notice that it is subject to regulation and that the whole use of those common facilities at the airport is subject to regulations. [495]

As I understand, Mr. Andrews could not recall that he was aware of any enactment in 1941 by the Public Utilities Commission or that mention had not been made of existing fees. It seems to me that must be just a lack of memory on Mr. Andrew's part, because how else could there ever be verbatim put into the lease of 1942 those very rates and schedules that were set up by the Public Utilities Commission, confirmed by the Board of Supervisors after public hearing in 1941. I am not decrying the effectiveness of Mr. Andrews as a witness or as a gentleman, but it is just one of those things that he has forgot, apparently, over the many years that have intervened since that lease has been prepared. But there it was, written into the lease.

Counsel maintains that we have the right to fix

fees and to carry them on indefinitely. That is not so, as a matter of law, I respectfully state to the Court. The only time that that can be done is where there is a specific provision in some charter or in some act that would permit such a thing to be done, and then it might become a binding contract, but not under all conditions.

In distinction to the cases that he has cited here, we are confronted with this situation: That not only do we not have anything that will permit us to go into a firm contract for rates for these common properties extending over a period of years, but we have an inhibition in it, and that is that [496] Section 130 of our Charter that advised us—and I read it to you this morning:

“The Public Utilities Commission must fix rates and schedules of charges for all utilities owned by the City, both within and without the City and County.”

That is paraphrasing the language of the forepart or middle section of 130 of the Charter, but in essence it is what it provides. So there you have a direction inhibition, and any of the cases that counsel may have cited, and he has a few here, that says that where there is statutory permission to make such an agreement that there it may be sustained; but that isn't the case before Your Honor. The case before Your Honor is that there is an inhibition. A charter, as Your Honor well knows, is a designation of limitations of power upon a city, and you may not deviate from those when they are specified in the charter. And in the charter in this

instance, Section 130 tells you as I have just related: That you must fix this schedule of rates of all utilities whether within or without the City and County of San Francisco.

I think, really without taking up too much of the Court's time on that, that we can let that be considered as a sufficient answer and a sufficient distinction to these cases that counsel has cited.

I am trying to lay my hand now on another case I should [497] like to call the Court's attention to. This case of *St. Cloud Public Service Company vs. St. Cloud*, 265 US 352, might be worthy of a little consideration, if Your Honor please. This is an action brought by the Public Service Company to enjoin the City of St. Cloud from interfering with a proposed increase in the rates charged for fuel gas. In 1905 the city by ordinance granted a franchise to the company and authorized it to sell its fuel gas at the rate of \$1.30 per thousand cubic feet. The city refused to entertain a petition prescribing a rate yielding a reasonable return on investment, the company claiming that a rate of \$3.39 per thousand cubic feet was necessary. The company increased its rate accordingly and brought the suit to enjoin the city from interfering with the proposed increase.

The city claimed that there was a valid existing contract between the city and the plaintiff company governing the maximum rate for fuel gas. The District Court dismissed the company's bill to enjoin. This decision was affirmed by the Supreme Court. This decision does hold that, under the cir-

cumstances of the case, a contract fixing public policy rates was a valid one.

The Court construed a provision of the St. Cloud Municipal Charter, Section IV, providing in part as follows; quoting from the charter:

“The common council shall have full power [498] by ordinance to provide for and control the erection and operation of gas works, to grant the right to erect, maintain and operate such works, provided that the common council shall have the authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned.”

The Court stated, in construing the charter provisions it would look to the decisions of the Supreme Court of the State of Minnesota. And then the Court considered two cases of the Minnesota Supreme Court and states as follows, 265 US, 359, 68 Lawyer's Edition, at 1055, column 2:

“In the light of these decisions of the Supreme Court of Minnesota”— this is our Supreme Court speaking— “—of the State of Minnesota we think it clear that the city had authority, in 1905, under its charter and the laws of the State, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of 30 years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the Reed Case, [499] under the provisions of the charter giving the council the power to pro-

vide for the control and erection of gas works for the purpose of supplying the City and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to 'regulate and prescribe' the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any State decision to the contrary, would, under the construction given similar language in *Home Telephone Company vs. Los Angeles* and be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the City to contract as to rates."

That was referring to the *Los Angeles* case.

"And in the present case, as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think [500] that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rights in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises

the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding.”

A clear expression of the rule following the *Home Telephone Company vs. City of Los Angeles* case is *Railroad Commission vs. the Los Angeles Railway*, found at 280 US, 145, 74 Lawyer’s Edition, 234. In this case the Los Angeles Railway Corporation brought suit to abrogate rates fixed by its franchise from the City of Los Angeles. [501] The District Court of the Southern District of California held the fixed rate provision of the contract or franchise invalid. This was affirmed by the United States Supreme Court.

The Los Angeles Railway Corporation operated in Los Angeles under a number of franchises with the City which provided that the rate of fare should not exceed five cents. The franchise was granted between 1890 and 1918. In 1926 the Los Angeles Railway Corporation applied to the Railroad Commission for authority to increase the basic fare to seven cents. In 1928 the Railroad Commission denied the application, and the Court had the following to say—this is our Supreme Court:

“The sole controversy is whether the company is bound by contract with the City to continue to serve for the fares specified in the franchise—it being conceded that the finding below respecting the inadequacy of the five-cent fare is sustained by the evidence. Appellants contend that at all times the City had power to establish rates by agreement

and that the franchise provisions constitute binding contracts that are still in force. On the other hand the company maintains that the State never so empowered the City; and it insists that, if the power was given and any such contracts were [502] made, they have been abrogated.

"1. It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. * * * And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. * * * And, in such case, the Courts may not relieve the utility of its obligation to serve at the agreed rates however inadequate they may prove to be.

"This Court is bound by the decisions of the highest courts of the States as to the powers of their municipalities."

And then cites cases.

"Our attention has not been called to any California decision, and we think there is none, which decides that the State Legislature has empowered Los Angeles to establish rates by contract. This Court is therefore required to construe the state laws on [503] which the appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to

time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its power to tax."

And that is the end of the quotation there.

In short, there are certain circumstances where a municipality may have its powers of fixing the necessities of health and welfare of the public at large and where there are those that can be just as active in an adjoining county that that may be suspended for a limited time, but under the decisions that I have given Your Honor here there must be clear statutory authority for that very purpose, and they are not looked upon with favor from the quotation that I have just given you.

However, we are not even in the predicament of trying to determine that in this case here because, as I have pointed out before and reiterate again to Your Honor, that Section 130 of the Charter of the City and County makes it mandatory upon the City and County to prescribe rates for all utilities that [504] it owns and operates both within and without the City and County of San Francisco, negating anything that may be implied in the right to enter into a contract that would transcend that power. That is a limitation of the powers of the City. It cannot go beyond those prescribed state-

ments that are contained in Section 130 of the Charter.

Of course, to show how a municipality may act when it is fixing rates, we will respectfully call your attention again to the case of *Connett vs. City of Jerseyville* (C.C.A. 7, 1940), 110 Fed 2nd 1015, and this is a brief excerpt from it:

“The governing body of a municipality, when fixing utility rates or charges, is performing a public function of the municipality and acting as a rate-making body as distinguished from its private function as owner and operator of the utility.”

That in a measure upsets the argument that counsel made this morning and in his brief that this is a unilateral attempt upon the part of the City to set rates and charges for these utilities that are used in common with these other carriers who pay a different rate than we seek to impose upon plaintiff in this case.

The sixth part of the brief of counsel is given to commercial frustration.

Of course, I guess none of us when we were in law school [505] were given that doctrine of commercial frustration, and it wasn't until about seven or eight years ago that I encountered it for the first time in a decision—I think counsel mentioned it this morning, somebody against *Murphy*—in a case which arose in Los Angeles where a man had entered into a contract, what he thought was an advantageous lease for premises to conduct some sort of an automobile agency and repair shop and one thing or another, and as counsel said this morning,

automobiles were no longer available. In addition to that, if I remember that case, the State of California came along and built a roadway in front of his establishment and made it impossible for him to conduct his affairs, I believe. That is the case, and that is the first mention of commercial frustration that has entered into our laws in California.

The Court: Do you think that it enters into this case?

Mr. Holm: Pardon me?

The Court: Do you think that it enters into this case?

Mr. Holm: I think it does. I think it is worthy of the Court's consideration.

The Court: I call that to your attention because I wasn't impressed with it. Now I may have made a casual reading.

Mr. Holm: No; I think that it is worthy of very careful consideration for the reasons that here we entered into [506] contracts in 1942, as I explained this morning when aviators, to use that expression again, were flying by virtue of the seat of their pants, the thing was in such infancy. And I use that expression because it is so illustrative of this entire industry as compared to today where they have a series of instruments in front of them that requires about six or seven engineers to decipher which button should be pushed for what purpose, and I guess they have to have an engineer, almost, to read one of them. That is the way the development has progressed. Nobody dreamed in 1942—certainly, they talked about something that was

huge and was going to happen; the Army had these secret machines that were going to come in and use the airport. Nobody knew of the thickness of the pavement. How could Mr. Doolin or how could the Public Utilities Commission of the City and County of San Francisco five laymen sitting up there, or Mr. Cahill who was then Manager of Utilities and Mr. Turner now—how could they envision in the future that the bringing in of heavy planes continuously, not a little operation now and then or a few planes maybe a day, would disrupt the pavement that they had on their runways and on their taxiways and on their aprons or loading zones? [507] No, a few operations of that sort they all agree would not have done much harm and didn't when Army came forward with a few of those planes and did use it with fair regularity during World War II. But nobody at that time entertained the slightest notion that the air companies would ever have for transportation these huge planes that are now a reality.

And that is borne out again by what I said this morning. That is something that no reasonable group of men could have anticipated, and that is one of the rules that is set down on this idea of commercial frustration that is pointed out in the decisions that uphold it and say that it is a valid defense to certain written documents and certain impositions made upon contracting parties. And it is something that has entered into our law and is very definitely in here, and in this case I believe it does apply for what I have told you because of

the situation. As I say again today, where on earth do we know we are going with the aviation industry at present? Navy claims there is no need for land planes virtually any more with the way they have progressed. They have made advancements, and it is all supposed to be top secret information, although it was brought out a little bit in our bridge hearings before the United States Board of Army Permits and Board of Army Engineers. The prospects that they have would be unbelievable if you would—were to give credence in detail to everything they say to you and you might [508] as well fold up your airports. It makes a city like San Francisco feel apprehensive after investing all these many, many millions of dollars of the taxpayer's money to say that maybe there is going to be no use for that, because if Navy is right in their views and they so perfect their engines, as they claim they have done with these little things they call the dot that now can keep water out of the engines and out of the fuselage and everything else and they can skim over the water at tremendous speed and get going I guess about as fast as sound—and now they have not only on the board but they claim in actuality these huge water planes that are going to outlift and outmaneuver and travel longer distances than anything they have on land. I say the industry is even in a state of confusion now. And that is recognizable, and everybody is aware of that.

Now just imagine and transport yourself back to 1942. That is 10 years back, or more than that

now. There was even more confusion existing then. So here were honest people getting together for an honest purpose. There has been no chicanery, thank God, in this case on either side. It is just one of those situations that could not be anticipated by either side.

But I want to say in connection with this too that don't forget that in this lease it is provided that this lessor, the plaintiff in this action, TWA, will be given the right to use [509] these common facilities in common with others and never at any greater cost than that of those others who may use it. If we just imagine the reverse of this situation, while we are on this theme of commercial frustration and how their minds must have been not at meeting on anything that was concrete to meet, as they now say for the future 300,000 pounds, a rebuilding of all that airport down there to accommodate them. That is not feasible. Are we going to say that we are going to now expend another \$40,000,000 to accommodate Mr. TWA's passengers and ours because we use it in common so that they may have the facilities of that airport, without their putting anything into it and using the taxpayer's money for it? It is not equitable; it isn't fair, any more than it is fair to say that what we had in mind in 1942 was the reasonable use of 25,000 and 54,000 pound planes to come into there and that it would not disrupt our pavement, and then the heavy ones came and they did disrupt it and we had to go out and rebuild.

Why, the minds didn't meet as to what they were

going after. It is commercial frustration as the decisions have defined it and as I see it, because this science has so progressed from the day they entered into that contract up to the ensuing few years that it has changed the picture entirely. And looking forward, doesn't it appeal to Your Honor that it must be ridiculous to think that we would be ready for weights of 300,000 pounds, and that would mean now a third rebuilding [510] of that airport down there, at the Lord knows how many more millions of dollars of taxpayer's money.

And we are going to litigate with the other carriers in this matter, you can rest assured. We have one suit on file now to be relieved of this onerous and we feel inequitable and illegal provision in the lease. And we are going to do that with the three because they are not there and they are not just, they are not reasonable.

What do we do? We sit back and we put the burden of making up some of the \$650,000 deficit in operating expenses on 10 other carriers that use the place. That puts these three people or three corporations in a preferential group and does something contrary to equity and contrary to what the Supreme Court of the United States and you, Your Honor, have ruled that rates must be reasonable, they must not be discriminatory.

And if Your Honor were to give the interpretation the plaintiff seeks in this case, you would be lending yourself wholeheartedly to the proposition that you would be allowing discriminatory rates to stay in effect and to give these three carriers who

have contracts the preference over other operators in it.

All these things come into this question of commercial frustration. And of course if you bear in mind the future as well when you are considering this case as a fact and realize what would San Francisco do and where would we be when we have [511] to rebuild again. There wouldn't be any airport, at least that would accommodate what the Civil Aeronautics Authorities say would be the required load, 300,000 pounds.

The Court: What does the City of Los Angeles do with their Airport? I don't know anything about the history of that.

Mr. Holm: I have got enough troubles here, if Your Honor please, in our own courts. I know that in Los Angeles they have one that is privately owned and one that is owned by the City.

And of course I don't know this to be a fact; but when counsel says he has 51 cities in which this interpretation of this Court will have effect, I think upon investigation of those 51 cities he will find in many of them they are paying the direct schedule of rates and are not tied with any contract. I don't know that, but I am saying that and I probably shouldn't, because I haven't the facts at hand.

I would rather not pay any attention to Los Angeles. It is difficult enough to try to take this tremendous losing enterprise and burden on this city and bring it up.

The Court: I don't mean particularly Los Angeles; I mean other airports throughout the coun-

try. There has been no case cited. You come to this court and tell me there is no precedent for me to follow.

Mr. Holm: That is right. [512]

The Court: And all of these activities are going on and here I am helpless.

Mr. Holm: You have the distinction, Your Honor, of making law.

The Court: Isn't that ridiculous?

Mr. Holm: It is, Your Honor. It will be the destiny for the cities and the welfare of the people throughout the nation versus the claimant here.

The Court: I hope we haven't another Hetch Hetchy case.

Mr. Holm: Well I hope not.

The Court: I am afraid that we have.

Mr. Holm: I don't think so, Your Honor.

The Court: And I say that advisedly and kindly.

Mr. Holm: Well, we go on now to Section VII, if I may, of plaintiff's brief.

The Court: You may. [513]

Mr. Holm: They state in their brief that "If the charges provided in the lease are public utility rates there has been no valid regulation of the rates heretofore paid by Trans World Airlines. No recovery can be had of charges applicable to a period prior to the date of filing the cross complaint." That is their contention on the seventh part of their brief. I don't think it requires anything further in the way of answer that we have to make other than that contained in our brief on Point 7. I laid emphasis upon the others because counsel said that

we neglected in our brief to answer Points 2, 4 and something, I forgot what it was. But they are answered, as he later on concedes, at least inferentially in some of the points, and I think that we cannot do other than review again what we have said.

The Public Utilities Commission in this case, no officer of the City and County of San Francisco, no group of officers can ever take away the police powers that are vested in the City as such to prescribe rates and charges for utilities as is stated for them in the Charter and which they must follow. That is a doctrine of limitation and they cannot go beyond that. And Section 130 is mandatory that they do just precisely what they have done in this case and what they have made provision for in the contract insofar as contracting away the rates is a nullity. The rest of the contract, insofar as it may apply to the real properties involved, the [514] use of the terminal building, the use of the hangar and use of the area directly in front of the hangar—those are all proper objects for leasehold interest and to be sustained by the Court. But any of those common facilities that are operated outside of the line of the terminal building,—the aprons, the taxiways and the runways—those are common facilities that are used by all carriers. The Court must not have in mind that this is a certain little area that these people are only confined to. This whole area is occupied by 13 now it is, I believe, or 12 common carriers, air carriers, flying in there. They use the runways in common and use the taxiways and use

the loading zones, which are called the aprons as well. They all use them and they are in there. If this was sustained, you have the unconscionable situation that one airplane standing alongside of the other owned by a different company—that that would impose a rate higher on one than it would be on the other, and therefore would put that man in a position, the one that had the preferential rate, in an unfair position for competition with the man who has the higher rate. It is not conscionable. It isn't equity and it isn't legal, because rates and charges must be uniform and not discriminatory. That is fundamental of our Supreme Court decisions and the decisions of this Court many times throughout the years.

I am very grateful to Your Honor for the time that you [515] have allowed us in making our presentation, and we trust that you will see fit to give very careful consideration to our views.

The Court: I assure you that I will.

Mr. Holm: Thank you, Your Honor.

The Court: We will take a recess.

(Short recess.) [516]

Mr. Dyer: If it please the Court, Mr. Holm's argument adverted to the fact that the City, subsequent to the execution of this lease, improved the airport at great expense to the City and County of San Francisco.

Now, it isn't my understanding that, as a principle of law, improvements made by a lessor after a validly executed lease, is a basis for avoidance of obligations under that lease. I do not believe that

the improvements, voluntarily made by this lessor at the San Francisco Airport, have any bearing on the legal issues to be presented to Your Honor. I think essentially the question in this case is whether or not the obligations contained in this lease, admittedly openly and honestly arrived at, are binding upon the parties.

If we were to accept the conclusions which are implicit in Mr. Holm's argument, any lessor who made a lease with a lessee could at any time thereafter, by the simple expedient of undertaking to improve the property, voluntarily improve it, improve the lessee out of his lease. And thus it can be seen, since that is the logical extension of Mr. Holm's argument, that it should have little consideration.

Now, I might also say this to Your Honor; that the concern of this airline in this case is not primarily with the number of dollars it pays the City and County at the San Francisco Airport. Our concern, Your Honor, is with the maintenance of the principle that if we arrive openly and honestly [517] at an agreement with the City and County concerning the operation of an airport, that we should with some certainty be allowed to rely on the obligations contained in that lease for its term.

We have advanced that argument to the City from time to time and have been met with the adamant statement that they, under their public utilities powers, as alleged, can at any time destroy the obligation contained in that lease.

Now, I don't wish to go over again, and I will

not, all the evidence which bears upon this so-called defense of "commercial frustration". I did note, however, Mr. Holm's descriptive phrase at the time in 1942 the pilots were flying by the seat of their pants, indicating at that time aviation was in a formative and simple stage and has progressed to a very complicated stage since then.

Well, of course there has been progress, Your Honor. But may I state that in 1940, two years before the lease, there were in commercial operation the Boeing Stratoliners which were used for a long time thereafter. And there was in production in 1938, four years before the lease was executed, the very planes we use at the San Francisco Airport today—the Lockheed Constellations.

So those same planes were in production and in certain places in commercial operation at the time and before the execution of the lease. [518]

Now, there has also been discussed in the City's argument the fact that the fees and charges for the use of facilities at the San Francisco Airport are fixed charges, included in the 1941 schedule of rates and charges.

Well, of course Mr. Doolin, the Airport Manager, apparently didn't know anything about that. At least, that was the purport of his testimony. And also that was the definite testimony of H. B. Andrews. They said that they arrived at this by discussion and that Mr. Doolin then set the rates.

In any event, Your Honor, whatever the import of that argument might be, may I point out to Your Honor that in the very lease itself there is a

provision that "except as authorized in this lease document, no charges or fees of any kind shall be imposed by the lessor upon the lessee during the term of this lease."

That, Your Honor, is set forth in paragraph 13, page 13, and it states as follows:

"Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by the lessor, directly or indirectly, against the lessee or its employees, passengers, and so forth".

Now, Your Honor, I don't know what the purpose of that particular paragraph would be unless the parties intended that those particular charges and fees should remain for the duration [519] of the lease term. And here it is explicitly and specifically set forth in the lease document itself.

Going on briefly to another subject, Mr. Holm states that the general promulgation of these notices is sufficient notice to us. That is not the type of notice that was adverted to in the plaintiff's brief or in the argument this morning.

The cases hold if a rate is set forth in a contract, there must be notice given to that particular contract holder concerning the reasonableness or unreasonableness of that rate and if it desires a hearing had concerning the reasonableness or unreasonableness of that rate. I do not believe a general promulgation of a rate schedule was sufficient to meet that requirement of notice.

Mr. Holm briefly adverted to the fact that this

was a true utility because if somebody were hurt on the runway certainly the City, as well as the airline, would be sued. Well, I think we can agree with that, Your Honor. But the City would be sued only because it would be acting in its proprietary capacity or business capacity in the operation and management of the airport. Certainly we all know that if a governmental agency is acting in a governmental capacity it has its sovereign immunity and is protected from suit of that character.

There was some reference to the point of preference or [520] discriminatory rates. Well, of course that argument assumes that these lease charges are rentals or rates. And I think we went into the question that we do not believe that this is a charge applicable to or paid by the individual members of the public. It would doubtless seem that that argument has no validity with reference to this specific contract.

Mr. Holm then went through our brief and adverted to the various sections. He said that Section 1, which concerned the authorities we cited, statutory authorities, for the leasing of these facilities were more or less agreed to by the City and County. Of course we are gratified with that fact. And we are so, Your Honor, because I think it points out, Your Honor, that the other courts in the country that have even touched upon this problem have stated time and again that the lease of land and facilities is valid.

We have talked about the Milwaukee case which involved the lease of land and facilities at General

Mitchell Field in Milwaukee, and there the Supreme Court of Wisconsin talking about the contract stated that the lease of land and facilities between the National Carrier Airlines and the Municipal Airport Operator is valid.

Similarly, that was the statement and comment of the Oklahoma Court concerning the Will Rogers Memorial Airport.

Whenever courts have had occasion to touch upon this problem by dicta or otherwise, that has been the comment.

Now, there is also this to think about, Your Honor; I [521] have been advised definitely by people who know—airline people—that we operate at the Los Angeles International Airport, a huge airport, under contract and lease arrangement. Lockheed Air Terminal at Los Angeles is a privately operated air terminal. It has runways and ramps and taxiways. There isn't any question.

And I am also advised that that is the case in the fifty-one other points at which we operate throughout the United States. I believe that is practical authority for the proposition that the leasing of facilities and land at airports *at proper*.

Mr. Holm discussed Section 130 of the Charter. Now, of course that assumes that these rents and charges in our lease agreement are rates, and again we believe that if they are true rentals and charges for use of land and facilities, that that Section has no application.

Also, in line with the various Supreme Court cases we adverted to this morning, if the City has

both the power to fix rates unilaterally and fix rates by agreement—and by unilaterally, Your Honor, I mean fixing them in accordance with the Section 130—that if it *is elect* to fix the rates by way of contract its power to fix rates unilaterally or by a Public Utilities Commission is expended during the term of the lease. That is the precise holding of the St. Cloud case which was adverted to by Mr. Holm. That case states [522] specifically that if the City elects to fix its rates by contract, then its power to fix rates unilaterally during the term of the lease is suspended.

Now, Your Honor, we believe that essentially this case gets down to the determination of whether or not this airline, and other airlines at San Francisco and at points throughout the United States, is entitled to rely on these honest contracts, arrived at, as Mr. Holm stated, by honest people on a negotiated basis. We think the principle is the important thing in this case. And we believe that on the authorities stated here, as well as on the equities of the case, a decision should issue holding that this honest contract, openly arrived at, should be upheld.

Thank you, sir.

The Court: Now, gentlemen, I am going to inquire from you while you are here, and it might assist the Court in the final determination of this case, what questions are to be answered by this Court in this case as submitted? I take it you are submitting the case now on both sides?

Mr. Dyer: Yes, sir.

Mr. Holm: Yes, Your Honor.

The Court: What questions are for decision?

Mr. Holm: Well——

The Court: I will hear from counsel.

Mr. Dyer: Your Honor, we believe that the questions for [523] decision might almost be picked out from the main headings of our main brief. Perhaps not all of them need be answered extensively because Mr. Holm has admitted to some extent that, for instance, there is power to——

The Court: Pardon me, I have another suggestion.

Mr. Dyer: Yes, sir?

The Court: Since it needs some thought, I will give you five days on each side to submit that proposition.

Mr. Dyer: Thank you, sir.

The Court: So that you will have time to think the matter through.

Mr. Holm: Will counsel serve his suggestions on me within five days, and then I will reply and serve my suggestions on counsel five days after that.

The Court: Agreeable, counsel?

Mr. Dyer: I think so, Your Honor.

The Court: Five, five and five. He is the moving party. Do you want to go forward?

Mr. Dyer: Well, that is agreeable. My counter suggestion would be if we both put in concurrent suggestions within ten days.

The Court: Whatever way you wish.

Mr. Holm: I think the way first suggested would be better.

Mr. Dyer: We have a holiday.

Mr. Holm: Give him a week. [524]

The Court: The importance of that is, no matter what this Court may do, this case is worthy of going forward. I want to have a proper record. That is all I am trying to do.

Mr. Dyer: I agree, sir.

The Court: So that I may be able to assist the Court in making a final determination of this case. It's as simple as that to me.

Mr. Holm: If counsel submits his in a week I will be very glad to submit mine in a week.

The Court: I will give you ten, ten and ten, if you wish.

Mr. Holm: That will be better.

Mr. Dyer: That will be better.

The Court: All right, that will bring us to what date?

The Clerk: That will be January 29, Your Honor.

The Court: January 29. [525]

[Endorsed]: Filed April 12, 1954.

[Endorsed]: No. 14523. United States Court of Appeals for the Ninth Circuit. Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Phillip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14523

TRANS WORLD AIRLINES, INC., formerly
known as TRANSCONTINENTAL & WEST-
ERN AIR, INC., a Delaware Corporation,
Plaintiff and Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a
California municipal corporation, et al.,
Defendants and Appellees.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Appellant, Trans World Airlines, Inc., a corporation, intends to rely on the following points on the appeal herein:

1. The District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as the "District Court"), erred in entering a judgment for appellee City and County of San Francisco, and in denying appellant's application for an injunction and other appropriate relief as prayed for in the complaint for each of the herein given reasons severally and for all of said reasons collectively.

2. The District Court erred in deciding that during the term of the lease between appellant and appellee City and County of San Francisco, said appellee regulated and prescribed rates applicable

to appellant which rates appellant was obliged to pay for the use of facilities at the San Francisco Airport.

3. The District Court erred in deciding that the furnishing of facilities consisting of ramps, runways, taxiways, beacons, signal lights, fire protective service and other facilities at the San Francisco Airport to appellant constitutes a public utility service.

4. The District Court erred in deciding that appellant and other airlines are the public served by the municipally owned airport.

5. The District Court erred in deciding that appellee City and County of San Francisco acted in a legislative or rate-fixing capacity when it fixed charges for the use of facilities by appellant and other airlines at the San Francisco Airport.

6. The District Court erred in deciding that appellee City and County of San Francisco through its Public Utilities Commission has jurisdiction and power to establish rates for the furnishing of a public utility service without the territorial limits of the City and County of San Francisco and that said appellee can exercise a police power or legislative rate-fixing power beyond its territorial limits and jurisdiction.

7. The District Court erred in deciding that appellee City and County of San Francisco under the doctrine of *Home Telephone Company vs. Los Angeles* (1908) 211 U.S. 265, and *Public Service Co. vs. St. Cloud* (1924) 265 U.S. 352, could not fix charges for the use of facilities at the San Fran-

cisco Airport by lease agreement with appellant binding on the parties for the lease term.

8. The District Court erred in deciding that as a matter of law a general schedule of rates and charges promulgated by appellee City and County of San Francisco supersedes all contracts between said appellee and appellant for the use of facilities at the San Francisco Airport.

9. The District Court erred in not deciding that statutes of the State of California and the Charter of the City and County of San Francisco authorize appellee City and County of San Francisco to lease facilities at the Airport for a definite term.

10. The District Court erred in not deciding that in the fixation of the charges for the use of facilities at the San Francisco Airport by appellant appellee City and County of San Francisco acted in a proprietary and not in a governmental capacity.

11. The District Court erred in failing to decide that the lease of land and facilities executed by appellee City and County of San Francisco and appellant is not a rate contract.

12. The District Court erred in failing to decide that there was no intention by appellee City and County of San Francisco to make the rates and charges contained in the general schedules of rates and charges applicable to the charges in the lease between appellant and appellee City and County of San Francisco during the term of said lease.

13. The District Court erred in failing to decide that appellee City and County of San Francisco intended at the time of the execution of the lease

by said appellee and appellant that the rates and charges provided in said lease would be effective and binding on the parties thereto for the lease term.

14. The District Court erred in failing to decide that appellee City and County of San Francisco at the time of the adoption of the schedules of rates and charges for the San Francisco Airport did not intend that the rates and charges contained in said schedules should supersede the rates and charges provided in the lease executed by said appellee and appellant on October 1, 1942.

15. The District Court erred in not deciding that appellee City and County of San Francisco has never validly regulated the charges for the use of Airport facilities set forth in the lease between appellant and said appellee.

16. The District Court erred in not deciding that appellant has never received notice from appellee City and County of San Francisco that the charges for the use of Airport facilities set forth in the lease between said appellant and said appellee were superseded, invalid or unreasonable.

17. The District Court erred in not deciding that appellee City and County of San Francisco has never held a hearing concerning the validity, reasonableness or supersedure of the charges for the use of Airport facilities contained in the lease between appellant and said appellee.

18. The District Court erred in not deciding that appellee City and County of San Francisco has never made a finding concerning the reasonableness or validity of the charges for the use of Airport

facilities contained in the lease between appellant and said appellee.

19. The District Court erred in not deciding that the general promulgation of a rate schedule by appellee City and County of San Francisco is not sufficient to supersede or invalidate specific rates and charges agreed to by said appellee and appellant for use of facilities at the San Francisco Airport.

20. The District Court erred in deciding that recovery for rates in accordance with a general rate schedule may be had for periods prior to the time that rates agreed to in a lease were brought before the Public Utilities Commission and regulation proposed.

21. The District Court erred in deciding that fire protective service is a common use facility involving the provision of a public utility service for which a public utility rate can be charged.

22. The District Court erred in deciding that appellant was obliged to pay appellee City and County of San Francisco \$9,600 for fire protective service for the period January 1, 1951, through December 31, 1954.

23. The District Court erred in deciding that there is due, owing and unpaid from appellant to appellee City and County of San Francisco for the period from January 1, 1951, to and including February 28, 1954, the sum of \$86,342.54 as and for flight departure charges.

24. The District Court erred for all reasons herein set forth, severally and collectively, in not

making and entering a judgment herein that the lease executed by appellant and appellee City and County of San Francisco is valid and binding on the parties thereto as to all its terms until the termination of said lease.

Appellant's Designation of Record

Appellant hereby designates as material to the consideration of the appeal herein the following portions of the record:

1. Complaint (including exhibits).
2. Answer to complaint and cross complaint.
3. Answer of plaintiff and cross defendant to cross complaint.
4. Request for admissions by Trans World Airlines, Inc., dated March 19, 1952, and filed March 20, 1952.
5. Answer to request for admissions by City and County of San Francisco dated June 2, 1952, and filed June 4, 1952.
6. Motions to strike of Trans World Airlines, Inc., dated September 25, 1953, and filed September 25, 1953.
7. Oppositions to motion to strike by City and County of San Francisco dated October 30, 1953, and filed October 30, 1953.
8. Motions to strike by City and County of San Francisco dated October 30, 1953, and filed October 30, 1953.
9. Oppositions to motions to strike filed by Trans World Airlines, Inc., dated November 12, 1953, and filed November 12, 1953.

10. Proposed questions by Trans World Airlines, Inc., to be answered by decision dated January 8, 1954, and filed January 8, 1954.

11. Defendant City and County of San Francisco's statement of proposed questions to be answered by decision dated January 18, 1954, and filed January 18, 1954.

12. Plaintiff, Trans World Airlines, Inc.'s, proposed questions to be answered by decision in reply to defendants' statement of proposed questions, dated January 29, 1954, and filed January 29, 1954, and affidavit of service of said document dated January 29, 1954.

13. Reporter's transcript on the trial of the case and the transcript of the oral proceedings upon argument to the court on December 30, 1953.

14. Stipulation re Admission of Evidence dated May 20, 1954, and Exhibits A and B attached thereto.

15. The following exhibits of Trans World Airlines, Inc., entitled:

"No. 1—Number of Trans World's Airlines' Schedules per Month for Period of January 1, 1952, through December 31, 1952";

"No. 2—Recapitulation of Invoices Received from City and County of San Francisco Covering Fire Protective Service";

"No. 3—Recapitulation of Invoices Received from the City of San Francisco Covering Ramp Charges";

"No. 4—Statement of Rentals Paid by Trans World Airlines during 1952 under Lease dated

October 1, 1942, and Charges that Would Have Been Payable under the Schedules of Rates and Charges Effective January 1, 1951”;

“No. 5—Letter dated January 11, 1951, to Arthur Thompson from City and County of San Francisco Concerning Payment of Charges”;

16. The following exhibits of the City and County of San Francisco:

Lease executed October 1, 1942, by and between City and County of San Francisco, Lessor, and Transcontinental & Western Air, Inc., Lessee (Tr., p. 126, lines 3-8);

A—Trans World Airlines Actual Flight Departures from San Francisco Airport for the Period of January 1, 1951, to February 28, 1954;

B—San Francisco International Airport Rates and Charges Effective September 1, 1946;

C—San Francisco International Airport Rates and Charges Effective January 1, 1951;

D—Letter to A. R. Thompson of Trans World Airlines, Inc., dated January 11, 1951, and signed by Harold Messersmith and forms attached thereto;

G—Interim Rate and Charge Report, San Francisco Airport, March, 1951;

Q—Call for Bids for Lease and Signed Joseph J. Phillips, Director of Property;

R-1—PUC Resolution 4423, 6/2/41;

R-2—Affidavit of publication of Res. 4423;

R-3—PUC Resolution 4474, 6/23/41;

R-4—Journal of Proceedings, 6/30/41 of Board of Supervisors;

S-1—PUC Resolution 7504 and Affidavit of publication;

S-2—PUC Resolution 7829, 11/25/46;

S-3—Resolution 6106, series 1939 12/31/46;

S-4—PUC Resolution 7899, 1/6/47;

T-1—PUC Resolution 11093, 10/16/50;

T-2—Affidavit of M. M. Potter;

T-3—PUC Resolution 11182, 11/20/50;

T-4—Resolution 10628, series of 1939, 12/20/50.

17. Memorandum opinion and order of the District Court of the United States for the Northern District of California, Southern Division, dated March 5, 1954.

18. Proposed findings of fact and conclusions of law of plaintiff, Trans World Airlines, Inc., filed June 7, 1954.

19. Modifications of plaintiff, Trans World Airlines, Inc., to proposed judgment submitted by the City and County of San Francisco filed June 7, 1954.

20. Findings of fact and conclusions of law.

21. Judgment.

22. Notice of appeal.

23. Supersedeas bond.

24. Clerk's certificate.

25. The foregoing statement of points on which

appellant intends to rely on appeal and this designation by appellant of parts of the record material to the consideration of the appeal.

Dated: San Francisco, California, this 30th day of September, 1954.

/s/ LOYD WRIGHT,
/s/ CHARLES A. LORING,
/s/ LOYD WRIGHT, JR.,
/s/ EUGENE M. PRINCE,
/s/ NOEL DYER,

Attorneys for Plaintiff and
Appellant

Of Counsel: Signed Wright, Wright, Green & Wright; Pillsbury, Madison & Sutro.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 1, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE
CONSIDERED IN THEIR ORIGINAL
FORM

It is hereby stipulated by and between the parties hereto through their respective counsel that the exhibits of said parties designated in paragraphs 15 and 16 of Appellant's Designation of Portions of Record Material to Appeal may be considered in their original form without the necessity of reproduction

in the record. Said exhibits consist of rate schedules, flight schedules, invoices and other documents which would be costly to print and which can be best observed in their original form.

Dated at San Francisco, California, November 4, 1954.

/s/ LOYD WRIGHT,
/s/ CHARLES A. LORING,
/s/ LOYD WRIGHT, JR.,
/s/ EUGENE M. PRINCE,
/s/ NOEL DYER,

Attorneys for Plaintiff and
Appellant

Of counsel: Signed Wright, Wright, Green and
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/s/ DION R. HOLM,
City Attorney

/s/ THOMAS M. O'CONNOR,
Public Utilities Counsel,
Attorneys for Defendants and
Appellees

[Endorsed]: Filed Nov. 5, 1954. Paul P. O'Brien,
Clerk.

United States Court of Appeals
For the Ninth Circuit

TRANS WORLD AIRLINES, INC., a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM McKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,
Appellees.

APPELLANT'S OPENING BRIEF.

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United States Court of Appeals For the Ninth Circuit

TRANS WORLD AIRLINES, INC., a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM MCKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Plaintiff-appellant, Trans World Airlines, Inc., appeals from a decree denying declaratory and injunctive relief to plaintiff, and awarding to defendant-appellee, City and County of San Francisco, on its cross complaint, declara-

tory relief and a money recovery of \$95,942.64 (Tr. 3, 72, 226-227).¹

The point in controversy is whether a written lease between the parties dated October 1, 1942, with later supplements, regarding TWA's use of land, building space and facilities at San Francisco International Airport (Tr. 14-54), is a binding obligation as claimed by TWA, or whether it has been superseded in part by an alleged public utility rate schedule of the City's Public Utility Commission (Tr. 55). The City admits that the lease is a binding contract as to some of the items covered, but denies its obligation as to others (Tr. 242, 390 and *infra* 13). The controversy arises in the manner explained in the statement of the case. The District Court filed a written opinion and findings and entered judgment favorable to the City (Tr. 167, 198, 223; opinion reported at 119 F.Supp. 516).

Jurisdiction of the District Court was based on section 1332 of Title 28 of the United States Code. Diversity of citizenship, and an amount in controversy exceeding \$3,000, are admitted by the pleadings (Tr. 3-4).² As to diversity, TWA is a Delaware corporation (Tr. 3) and the City is a California municipal corporation (Tr. 4); therefore a California citizen for purposes of jurisdiction.

¹Henceforth in this brief the parties will be called "TWA" and the "City." All emphasis in the brief is ours unless otherwise stated.

²The City's answer replies to some allegations of TWA by reference to numbers of pages and lines of the complaint as filed in the District Court (see Answer, Tr. 72-80). These page and line numbers are not reproduced in the printed transcript. Hence wherever we refer to a fact as admitted by the pleadings, we have verified the admission by comparison of the original pleadings.

based on diversity (*Pearl River County v. Wyatt Lumber Co.* (5 Cir. 1921) 270 Fed. 26, 28, and many authorities cited).

The jurisdiction of this Court rests upon sections 1291 and 2201 of Title 28 of the United States Code. The judgment of the District Court is final and appealable under section 2201 (*Delno v. Market St. Ry. Co.* (9 Cir. 1942) 124 F.2d 965). The judgment was entered July 6, 1954; notice of appeal was filed August 2, 1954 (Tr. 227), and was timely under section 2107 of Title 28 of the United States Code.

STATEMENT OF THE CASE.

A. PRELIMINARY STATEMENT.

The written agreement involved in this suit, entitled a "lease," was executed on October 1, 1942, for a term of 20 years (Tr. 14-36). Thereby the City granted TWA the right to use hangar No. 4 at San Francisco International Airport and other land and building space for hangars, repair shops, and like purposes (Tr. 15-18). It also granted the right to use landing strips, ramps, taxiways, fueling equipment, lights, signals, baggage and passenger areas, and other airport facilities (Tr. 18-24). These latter for convenience are called "common use facilities," since they are used by all airlines.

The agreement on its face is not divisible as to obligation (see sec. 22, Tr. 34), and, as later shown, both parties treated it as binding in all respects up to 1951 (*infra* 10-12, 31-32). The City still concedes that the agreement is binding for its full term in so far as it grants TWA land or

building space for hangars and shops (Tr. 242, 390). But as to the landing strips, taxiways and other common use facilities, the City claims that the contract may be altered at any time by the City's Public Utilities Commission in the exercise of an alleged power of public utility rate making (Tr. 77 et seq., 115-116); further, that the contract has been so altered and that higher charges have been imposed for the common use facilities by a schedule adopted by the Commission, effective January 1, 1951 (Tr. 55). This contention was sustained by the trial court (Tr. 167, 198, 223), and the correctness of its ruling is the question on this appeal.

Not to anticipate argument, but to point up the questions with which this brief will deal, we note here that the City has now, and had in 1942, *express statutory authority* to contract with the airlines about the use of the airport facilities, and that this authority extended and still extends to common use facilities as well as to hangars and shop space (see *infra* 23-33, and statutory quotations in appendix). TWA contends that the lease-contract in suit is, therefore, binding in its entirety.

As to the alleged utility rate-making power, TWA believes that under a proper construction of the law, the power does not exist over the subject matter in suit; i.e., the use by the airlines of common facilities of the airport. But this appeal does not require determination of whether such rate-making power exists or not. If the City *has* rate-making powers, it also has and had in 1942 full power to *contract* concerning the use of airport facilities. This contracting power is, as we contend, decisive of the case. Where a municipality has power in a given situation

either to contract or to regulate, and chooses to proceed by contract, then, under cases later cited, it is bound by the contract for the full contract term.

The instrument by which the City claims that the agreement of 1942 was partially superseded was adopted by the City Public Utilities Commission, effective January 31, 1951, and is entitled "Rates and Charges, San Francisco Airport" (Tr. 55). The opening paragraph of this instrument reads as follows (Tr. 55):

"Section 1. General Provisions: *Except as otherwise provided, or amended by agreement*, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport."

Since the above language excepts the agreement in suit from the effect of the schedule it follows to the direct contrary of the judgment appealed from that the schedule could not partially or at all supersede the agreement. It follows also that the judgment could not stand even if the contract were partially voidable by regulatory authority as the City contends. Where a contract is voidable in this way, it remains in effect unless and until the regulatory body after a hearing on that particular contract expressly sets it aside as against public interest (authorities, *infra* 53-57). Here the Commission not only failed to take such action but expressly excepted existing agreements from its schedule. This point is not mentioned in the trial court's decision, and is, we will argue, an independent reason why the judgment cannot be justified. The fundamental point, however, is that the 1942 lease is not partially voidable, but was lawfully made and is entirely binding.

This appeal involves no issue of fact. The trial court found against the one factual defense made by the City (Tr. 178, 216-217, 220), namely, that the 1942 agreement, if it was a valid contract to begin with, has been avoided by commercial frustration (Tr. 73-74, 86-88, 240-241, 342, et seq.). The City's point was that the parties did not in 1942 contemplate the coming of the large size planes now in use which require larger airports and involve much more wear and tear on facilities (Tr. 73-74, 86-88). The trial court's finding against this defense (Tr. 216-217) is well supported; among other things, by testimony of Mr. Bernard M. Doolin, airport manager in 1942, who participated for the City in negotiating the TWA lease (Tr. 324):

“Q. But you did have in contemplation planes in excess of 25,000 pounds?

A. Oh, yes, yes.”

Further, the contract itself provided for added charges increasing with weight for planes weighing more than 25,500 pounds (Tr. 21).

Though the case turns on law points, we offer a further and narrative statement of the facts. The facts are not in dispute, and they establish a practical administrative construction consistent and only consistent with the entire validity of the 1942 agreement.

The agreement itself, three supplements to it, and the City's "rate schedule" of January 1, 1951, are printed in full in the transcript (Tr. 14-72). Certain bulky exhibits, such as recapitulations of invoices, flight statistics, official records, etc., are before the court in original form.

(Tr. 723-724). The appendix to this brief contains a reprint of pertinent constitutional, statutory and charter provisions.

B. NARRATIVE STATEMENT.

The City and County of San Francisco built and operates the San Francisco International Airport. The airport is situated in San Mateo County. Its facilities are utilized by military aircraft, and by private aircraft of all kinds, including at the time of trial twelve scheduled airlines of which TWA is one (Tr. 373). In 1952 the airport served about 3,250,000 members of the public, of whom about 2,500,000 were airline passengers (Tr. 374). Two of the twelve scheduled airlines, namely TWA and United Air Lines, have term contracts with the City for the use of land and facilities (Tr. 393, 453).

TWA is a national and international air carrier, operating out of 51 airports in the United States and 20 abroad (Tr. 245). It uses facilities of municipal airports in this country under contracts, and, until the present controversy arose, such use had nowhere been made a matter of municipal rate regulation (Tr. 268).

TWA's operations at the San Francisco Airport on an important scale go back to 1937 (Tr. 292). There was then no contract with the City and the airport was used on a month-to-month basis (Tr. 277, 308). However, the parties soon started talking about a long-term arrangement and got down to discussing specific provisions about

a year before they executed the agreement of October 1, 1942 (Tr. 280, 312). The airport then had only two scheduled air carriers, TWA and United Air Lines (Tr. 277, 308).

As to the City's reason for wanting a long-time arrangement, Mr. Doolin, airport manager in 1942 and for a long time before and after, testified (Tr. 315):

“Q. During the course of these discussions, Mr. Doolin, did you advance any reasons as to why the City should enter into a lease agreement?

[Objection made and overruled.]

A. Yes, definitely. For the purpose, of course, of the discussions, to obtain permanency of operations of airlines into San Francisco and assure the continued use of the Airport and the service to the City.”

Mr. Doolin testified also that competition with other airports was an inducing factor to the City to make the 1942 lease (Tr. 317-318). To questions by TWA counsel intended to bring out specifically that the City wanted a long-term lease in order to forestall TWA's making bay area headquarters at the Oakland Airport, the trial court sustained an objection (Tr. 316-317).

The lease term was agreed on as 20 years (Tr. 284-285, 318). As charges the City suggested the same figures as in the 1941 schedule of the Public Utilities Commission then current (Tr. 285, 469); TWA agreed after considerable protest on the ground that the amounts were too high (Tr. 285). The charges were written into the contract (Tr. 16, 18, 20-21); the contract did not mention the Commission schedule or incorporate anything by reference to it. That

the charges could be increased by the Public Utilities Commission was not contemplated.³

The lease details the uses which TWA can make of the common facilities at the airport (Tr. 18-22).⁴ It also details the City's obligations to maintain and operate the whole airport, including specifically the common use facilities (Tr. 23-24). These rights and obligations were part of the negotiated arrangements between the City and TWA. As said before, the charges were not left to be covered by the current schedule of charges or any future schedule. In respect to one matter only, namely, the right to store aircraft in hangars which might be operated by the City, the lease provided that the rates should be whatever might be currently charged (Lease, par. 3, subd. 4, Tr. 19). The City operated no storage hangar in 1942, and the con-

³Mr. Andrews, one of the negotiators for TWA, testified (Tr. 286):

"The lease was to protect us against any changes in the rates in the future over that period."

Mr. Doolin, airport manager and one of the negotiators for the City, testified that the agreement was made

"* * * in order to give them—to work out a suitable lease for permanent operating arrangement" (Tr. 308; see also Tr. 315).

In the agreement itself is section 13, providing (Tr. 28-29):

"13. Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor, directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement."

⁴The term "common use facilities" is used throughout this brief, unless noted otherwise, as referring to areas and facilities used in common by the *airlines*. The City has not asserted utility rate-making power over airport facilities used in common by others, such as limousine and taxi operators and many other enterprises (Tr. 384-390).

tract could not intelligently specify charges for a nonexistent service; consequently provided in the manner mentioned for charges for such service if ever rendered (Tr. 299-300).

The first draft of a definitive agreement was made by Mr. Doolin, the airport manager; several drafts were then worked into final form by the City Attorney's office (Tr. 310). The agreement was approved by the City Attorney, the Manager of Utilities, and the Director of Properties (Tr. 36); it was recommended by the Public Utilities Commission (Tr. 39) and executed by the Mayor after unanimous authorization by the Board of Supervisors (Tr. 36-41), and after an advertised call for bids for use of everything involved, land, space and facilities (Tr. 37-39).

On May 31, 1946, the parties made a supplementary agreement for added floor space in the administration building (Tr. 41-43). By supplementary agreement dated November 1, 1947, TWA acquired a gasoline storage area on a rental basis (Tr. 45-52). By supplementary agreement dated June 2, 1948, the parties renegotiated the rental for space in hangar No. 4 (Tr. 52), an escalation for which the original agreement of 1942 had provided (Tr. 16-17). The amendments to the contract in 1947 and 1948 provided for similar charges to those established by the current schedule of the Public Utilities Commission for the particular items involved, but the changes were effected as a matter of contract and without reference to public utility rate-making powers. Thus the agreement of June 2, 1948, provided (Tr. 53):

“Whereas, this Memorandum of Understanding between the City and TWA does hereby revise and pro-

vide that the certain charges incorporated in Paragraph Number 1 will concur with those established by the City.

Now Therefore, it is mutually agreed between the City and TWA that effective October 1, 1947, the rental shall be * * * .”

All the supplementary agreements refer to and affirm the original agreement. Illustrative is the agreement of June 2, 1948 (Tr. 54):

“It is specifically understood and agreed that except as modified by this instrument, all of the terms and conditions of said agreement of Lease, dated October 1, 1942 between the City, as Lessor, and TWA, as Lessee, shall remain in full force and effect.”

In 1946 the Public Utilities Commission made a new schedule of rates and charges for the airport (City’s Exh. B, on file as original exhibit, Tr. 721). This schedule was originally to be effective September 1, 1946 (Tr. 721), but the date was later postponed to January 7, 1947 (City’s Original Exh. S-5, a copy of PUC resolution 7899). The opening paragraph of this schedule read (City’s Original Exh. B):

“Section 1. General Provisions: Except as otherwise provided, or amended by agreement, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

The scheduled charges were higher than those set in the TWA contract, but the City nevertheless, and consistently with the exception in the schedule, continued to bill TWA at contract rates (Tr. 248, 254).

In December of 1947, and while the 1946 rate schedule remained in effect, the City made a lease and agreement with United Air Lines, of similar general nature to the agreement in suit with TWA (Tr. 393); thus again proceeding under its contracting powers, without regard or reference to its supposed power of rate regulation.

On June 1, 1949, the City put into service a new concrete ramp or unloading apron in front of the hangars (Tr. 90, 258). For use of this ramp the City billed TWA for amounts additional to the contract charges (Tr. 258). Relying on the contract, TWA did not pay these bills (Tr. 258-259).

On November 20, 1950, after notice and public hearing,⁵ the Public Utilities Commission adopted the schedule, effective January 1, 1951, on which the City here relies. While the City now contends that this schedule superseded the contract of October 1, 1942, as to the common use facilities, the schedule itself negatives any such intention or effect. Its opening paragraph, like that of the 1946 schedule, read (Tr. 55):

“Section 1. General Provisions: *Except as otherwise provided, or amended by agreement*, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

As to whether the schedule is a public utility rate schedule, it does not say so, and in fact applies to many

⁵Def. Exhs. T-1—T-4, here as original exhibits (Tr. 722).

matters, such as rentals for shop space, which the City admits are not subject to rate regulation (see Tr. 55-72).⁶ Further, while the schedule is entitled "Rates and Charges, San Francisco Airport," it does not cover such a field. The charges are set for the use of facilities by aircraft operators and for various matters relating to delivery of petroleum products for aircraft use (Tr. 68-72). The numerous other businesses and concessions operating at the airport are not mentioned in the schedule and are affected, if at all, only by some of the rental provisions which the City admits are not subjects of utility rate making (see Tr. 384-390).

In January, 1951, the City notified TWA that it must make payments under the Commission schedule or it would not be allowed to fuel its planes (Tr. 9-10, 264). TWA then filed this suit. Since the City did not actually shut off TWA's continued use of the facilities there was no hearing on TWA's request for preliminary injunction (Tr. 13). The case was tried and the court entered judgment that section 3 of the agreement of October 1, 1942, relative to common use facilities was superseded by the rate schedule of January 1, 1951 (Tr. 225); also awarding a money recovery of \$95,942.64 for the difference between

⁶The City contended and the District Court found that the Commission exercised rate-making power under section 130 of the Charter in promulgating the rates and charges in Part III and Part X, section 2 of the 1951 schedule (Conclusions of Law Nos. 5, 17, 19, Tr. 218, 221). With respect to other sections of the schedule, e.g., Part IV, "Rental of an Entire Building or Structure—Rental of a Partial Building or Structure" (Tr. 60); Part VI, "Rental of Airport Property—Unimproved" (Tr. 62); Part VII, "Rental of Airport Property—Paved Areas" (Tr. 63); and Part IX, "Rental of Passenger Terminal Building Office Space" (Tr. 65)—the City admits that public utility rates are not involved (Tr. 242, 390).

the contract charges and the schedule charges from January 1, 1951, to February 28, 1954 (Tr. 226). TWA has taken this appeal (Tr. 227).

SPECIFICATION OF ERRORS.

Appellant, TWA, hereby specifies the errors intended to be urged on this appeal and states that the District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as "District Court"), in rendering the judgment appealed from, erred in the following particulars severally and collectively:

1. In entering any judgment either for money or other relief for appellee, City, and in denying TWA's application for relief as prayed in the complaint.

2. In deciding and adjudging that the furnishing of ramps, runways, taxiways, beacons, signals, lights, control tower, fire protective service and other so-called "common use facilities" at the San Francisco International Airport to TWA and other airlines constitutes a public utility service for which public utility rates can be charged.

3. In deciding and adjudging that TWA and other airlines are the public served by said Airport.

4. In deciding and adjudging that in establishing charges for the use of facilities by TWA and other airlines at said Airport, the City exercises governmental and legislative rate-making power and does not act in its proprietary capacity.

5. In deciding and adjudging that the lease and agreement dated October 1, 1942, whereby the City leased land and facilities at the San Francisco Airport to TWA, is a public utility rate contract.

6. In not deciding and adjudging that the Constitution and statutes of the State of California and the Charter of the City authorized the City to make said lease and agreement concerning facilities at the San Francisco Airport and to fix the rates and charges therefor for a definite and agreed term, and in not deciding that the City, having elected to exercise such power to contract as to said lease and agreement, is bound thereby for the term thereof and that its governmental power of fixing and regulating said rates and charges (if such exists) is not applicable to said lease and agreement.

7. In deciding that the doctrine of *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and like cases, is inapplicable to said lease and agreement.

8. In deciding and adjudging that the City through its Public Utilities Commission had jurisdiction to establish rates for the alleged public utility service here involved outside the territorial limits of the City and that the City can exercise such police power or legislative rate-fixing power beyond its territorial limits and jurisdiction.

9. In deciding and adjudging that the City has jurisdiction by unilateral action to alter said lease and agreement.

10. In deciding and adjudging that said lease and agreement is subject to the rate-making jurisdiction of

the Public Utilities Commission of the City in so far as "common use facilities" at the San Francisco Airport are concerned.

11. In not finding that the City received fair and just consideration for said lease and agreement; in sustaining objections of counsel for the City to questions asked by counsel for TWA of the witness Bernard M. Doolin for the purpose of showing that one of the reasons the City entered into said lease and agreement was to have TWA operating out of the San Francisco Airport as a national and international air carrier, and to prevent TWA from going to another airport such as Oakland, which, at the time said lease and agreement was entered into, was competing with the San Francisco Airport for airline service and patronage (Tr. 315-318). TWA counsel stated to the trial court in support of the admission of said evidence that competition between the San Francisco Airport and other airports for the services, schedules and patronage of the airlines was pertinent to the determination of whether different rates could be charged to different airlines if the Court should hold, contrary to TWA's contention, that the City's rates for common use facilities are public utility rates (Tr. 315-317).

12. In deciding and adjudging that during the term of said lease and agreement the City regulated and prescribed or had lawful authority to regulate and prescribe public utility rates applicable to TWA for the use of facilities at the San Francisco Airport.

13. In deciding and adjudging that the mere promulgation of a general rate schedule is sufficient to super-

sede or invalidate said lease and agreement providing specific charges; further in deciding and adjudging that, as a matter of law, the said schedule effective January 1, 1951, superseded section 3, another provision of said lease and agreement.

14. In deciding and adjudging that the City lawfully regulated or purported to regulate facility charges set forth in said lease and agreement of October 1, 1942, said decision and judgment being erroneous because:

a. The alleged rate schedule effective January 1, 1951, by which the Court holds that said lease and agreement was partially superseded, expressly provided that said schedule should be effective except as otherwise provided or amended by agreement, and so excepted said lease and agreement of October 1, 1942, from the scope and effect of said schedule.

b. The City has never held any hearing upon the lawfulness, reasonableness and validity of the charges specified in said lease and agreement; and

c. The City has never made a finding that said lease charges for the use of airport facilities are unreasonable, unlawful or invalid.

15. In allowing recovery for any period in accordance with said alleged public utility rate schedule effective January 1, 1951, because even if the City has powers as claimed by it to avoid in part the obligation of said lease and agreement, the City has taken no action sufficient to avoid it.

16. In deciding and adjudging that the rates and charges set forth in Part III of said schedule effective

January 1, 1951, constitute rates and charges for "common use facilities" at said Airport and supersede the charges for "common use facilities" set forth in section 3 of said lease and agreement, and that TWA is obligated to pay to the City rates and charges as set forth in said Part III of said general schedule; for this reason the District Court also erred in finding and adjudging that there is due and owing and unpaid from TWA to the City for the period from January 1, 1951, to and including February 28, 1954, the sum of \$86,342.64 or any sum as and for flight departure charges in accordance with the provisions of said Part III.

17. In holding and adjudging that the rates and charges set forth in Part X, section 2, of said general schedule of rates and charges effective January 1, 1951, constitute rates and charges for common use facilities at the San Francisco Airport consisting of fire protective service and that TWA is obligated to pay the City the rates and charges set forth in said Part X, section 2, any provision of said lease and agreement of October 1, 1942, to the contrary notwithstanding; for this reason the District Court also erred in finding and adjudging that there is due, owing and unpaid from TWA to the City for the period January 1, 1951, through December 31, 1954, the sum of \$9,600 or any sum as and for fire protective service charges in accordance with the provisions of said Part X, section 2.

18. In deciding and adjudging that said schedule effective January 1, 1951, supersedes section 3 or any part of said lease and agreement, because said schedule or any action of the City given such effect is invalid under the

Constitution of the United States, in that (a) it takes TWA's property without due process of law, and denies TWA the equal protection of the laws contrary to section 1 of the Fourteenth Amendment; and (b) it impairs the obligation of contract, to-wit, said lease and agreement dated October 1, 1942, contrary to section 10 of Article I. Said action of the City also violates the due process and impairment of contract clauses of the Constitution of California, namely sections 13 and 16 of Article I thereof.

For all reasons herein set forth severally and collectively, and without limitation of any specification by any other, the District Court erred in not making and entering a judgment herein that said lease and agreement of October 1, 1942, executed by TWA and the City is binding on the parties thereto in all its parts and for its full term.

SUMMARY OF ARGUMENT.

Appellant submits for the following reasons that the judgment of the trial court is wrong and that the lease-contract of October 1, 1942, between the City and TWA is fully binding.

I.

(City had lawful power to make contract in suit and contract fully binding.)

Regardless of whether the City has or has not utility rate-making power with respect to use of airport facilities by the airlines, it unquestionably had in 1942 (and has now) explicit statutory authority to *contract* regarding

charges for and conditions of such use; in other words, express statutory authority to make the 1942 agreement with TWA. Where a municipality has statutory power to contract and chooses to proceed by contract, as the City did here, then it is bound by the contract for the full term, and it cannot avoid the contract by exercising its power of rate regulation if such exists. The law to this effect is settled by decisions of the Supreme Court and of the Ninth Circuit.

The contracting power authorizing the agreement in suit is provided by state statute. This statute being explicit, there is no need to consider whether the City has a like power under its freeholders' charter. The reasons are (1) that under the California constitution a city with a freeholders' charter is bound by the general law except as to municipal affairs; (2) the operation of the San Francisco International Airport, used as it is in international, national and state-wide air traffic as well as by military aircraft, is not "a municipal affair"; and therefore (3) if there were inconsistency between the state statute and the charter on the point in question, the state statute would control.

But if the case could be considered as involving a municipal affair, nevertheless the City's authority to contract concerning the airport facilities and consequent authority to make the agreement in suit would still exist for two reasons: (1) because under the California constitution since 1914 a city with a freeholders' charter has all powers over municipal affairs not expressly withheld and the San Francisco charter does not withhold the con-

tracting power material here, and, independently, (2) on a fair construction affirmatively grants such power.

In addition to the express provisions of law, there is the strongest kind of administrative construction extending over years and consistent only with the view that the contract was lawfully authorized and completely binding.

It is thus shown that the contract in suit was within the City's authority to make, regardless of whether the question of authority is viewed from the standpoint of the state statute, or of the charter, or of the state constitutional provision on municipal affairs, or of long-continued practical construction. A valid contract cannot be superseded by unilateral action of the City. This is true both as a general proposition of law and under provisions of the State and Federal constitutions.

II.

(Utility rate-making power immaterial in this case, but actually nonexistent.)

For reasons given, the existence of utility rate-making power as claimed by the City is immaterial to the present case. Actually, however, the power does not exist, and we submit that the Court should so decide if the issue were material.

The City operates the airport in its proprietary capacity. It has broad powers of management, including broad contracting power, as is essential for the purpose of management. It claims also the governmental power of rate regulation as to charges to the airlines for common use facilities of the airport, and this claim it based in its arguments to the trial court on certain provisions of the

charter. Without conceding the charter is controlling on a question of this character, we point out that the power claimed by the City is not expressly granted and cannot be implied from the charter provisions, of doubtful meaning at best, on which the City relies. Such implication would be against long-continued practical construction, and would also conflict with express requirements of the charter concerning public utility rate making. These requirements were not met by the schedule of January 1, 1951.

III.

(If contract voidable, which it is not, City has taken no action sufficient to avoid it.)

Even if the contract were voidable by exercise of utility rate-making power (which appellant always denies), still the present judgment could not stand because the City has not taken action sufficient to avoid the contract. Where a contract is voidable by reserved regulatory authority, it remains in effect unless and until the regulatory body, after a hearing on that particular contract, expressly sets it aside as against public interest. The authorities are clear to this point. Here the Public Utilities Commission has not only failed to take such action, but has *expressly excepted* the agreement in suit from the schedule by which the City claims, and the trial court held, that the agreement has been partially superseded.

ARGUMENT.

I.

ASSUMING, WITHOUT CONCEDEDING, THAT THE CITY HAS RATE-MAKING POWER WITH RESPECT TO USE OF THE AIRPORT FACILITIES BY THE AIRLINES, IT ALSO HAS AND HAD IN 1942 EXPLICIT STATUTORY AUTHORITY TO CONTRACT REGARDING CHARGES FOR AND CONDITIONS OF SUCH USE; I.E., AUTHORITY TO MAKE THE LEASE-CONTRACT IN THE CASE AT BAR. HAVING ELECTED TO CONTRACT RATHER THAN TO PROCEED BY REGULATORY PROCESS, THE CITY IS BOUND BY THE CONTRACT FOR ITS FULL TERM.

A. The City's authority to make the contract in suit.

1. The state statute.

In 1942 there was in effect a state statute called the Municipal and County Airport Law (Cal.Stats. 1927, p. 485). This statute authorized any city, county, or *city and county* (the latter a specific reference to San Francisco, which is the only city and county in the State), *whether operating under freeholders' charter or otherwise*, to build airports (sec. 1); it authorized municipalities to incur indebtedness and issue bonds for airport purposes (sec. 2); it validated prior proceedings taken and debts incurred (sec. 3); and it provided municipal powers over the use of airports and their facilities (sec. 4). These powers *expressly included the authority to lease and to contract as to airport lands, building space and all other facilities*. Section 4 provided (Cal. Stats. 1927, p. 487):

“In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county * * * or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal,

the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith * * * to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air."

The above statute is printed in full in the Appendix. It was repealed in 1949, but similar provisions, quoted in the Appendix, were put into Government Code sections 50470-50478. Like the 1927 statute these sections expressly apply to a city and county and to chartered cities, and they expressly include power of lease and contract as to ground, building space, and facilities alike.⁷

⁷Cases citing the airport statutes are *Krenwinkle v. City of Los Angeles* (1935) 4 Cal.2d 611, 51 P.2d 1098, and *Pipes v. Hildenbrand* (1952) 110 Cal.App.2d 645, 243 P.2d 123. In the former case the court upheld the power of the City of Los Angeles to conduct an airport (4 Cal.2d 614). In the latter case the court by writ of mandate directed the city treasurer of Fresno to make payments on contracts for the erection of hangars at the Fresno Air Terminal. The court mentioned the statutory power to lease airport facilities (see 110 Cal.App.2d 647).

See also sec. 26020 of the Govt. Code superseding former Po Code sec. 4056c. It applies to county airports and gives county boards of supervisors various powers, including the right to make leases of airport facilities ("buildings, structures, lighting and other equipment and facilities necessary for such use").

2. The charter—Since the state statute contains an explicit grant of contracting power, there is no need to consider other provisions of law. But if the charter and state constitutional provisions about municipal home rule were material, these also would sustain the contracting power material to the case at bar.

Since the state statute explicitly authorizes such agreements as that in suit, there is no need to consider whether the City charter confers a like authority. The reason is that under sections 6 and 8(j) of Article XI of the California constitution, a city with a freeholders' charter is bound by general law except as to "municipal affairs," and the operation of the San Francisco International Airport is not "a municipal affair." The airport is used by international, national and state-wide air traffic, as well as by military aircraft. The charges for common carrier air traffic, freight and passenger, are regulated by federal and state authority (see 49 U.S.C. 642; also *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723). Under the state constitutional provisions above referred to, if there were any inconsistency between the state statute and the charter on the question of the City's right to contract regarding use of airport facilities by scheduled airlines, the state statute would control, since a municipal affair is not involved.⁸

⁸*Civic Center Assn. v. Railroad Comm.* (1917) 175 Cal. 441 450-451, 166 Pac. 351, holding that the State Railroad Commission has the right, and the City of Los Angeles no right, to compel railroads to establish a union depot in Los Angeles; *Bay Cities Transit Co. v. Los Angeles* (1940) 16 Cal.2d 772, 777, 108 P.2d 435, holding that the city has no right to divert busses from the Venice freeway; *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 783-785, 108 P.2d 430, holding that the city has no right to require two-men crews on earlines serving both the city and the outlying areas.

In *Ex parte Houston* (1950) 93 Okl.Crim. 26, 224 P.2d 281. involving the city's contract with limousine operators at the Will

If, however, the case could be considered as involving a municipal affair, it would still be true that the City had authority to make the agreement in suit. The first reason for this is that the charter does not expressly withhold the power to contract concerning the airport facilities. In *West Coast Adver. Co. v. San Francisco* (1939) 14 Cal.2d 516, 95 P.2d 138, the Supreme Court of California, referring to the 1914 amendments of the state constitution on municipal affairs, said (pp. 521-522):

“It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter [citing cases] * * *.

The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution to complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly

Rogers Municipal Airfield in Oklahoma City, the court said (p. 291):

“In considering the issues involved in the within case, we would not overlook that ‘While airports are local in nature, they are part of the national program in respect to financial aid, establishment, and maintenance, to the extent that they perform their function as a part of a unified and nationwide activity.’ Law of Aviation, Fixel, 3d Ed., p. 176 (The Michie Company).”

forbidden may be exercised by the municipality and any limitations upon its exercise are those only which have been specified in the charter.”⁹

Under the above rule, and still assuming without conceding that we are dealing with a municipal affair, there is no need to search the charter for an affirmative grant of contracting power. We submit, however, that such power does affirmatively appear, which is a further and independent reason showing that the agreement in suit was authorized.

The San Francisco charter was ratified by the people on March 26, 1931, ratified by the legislature on April 13, 1931, and became effective on January 8, 1932 (Cal. Stats. 1931, c. 56, p. 2973). Later amendments will be noted where material.

Section 2 of the charter provides in its opening paragraph that the City has power to “sell, lease and convey real and personal property,” and in its concluding paragraph that the City shall “have all rights and powers appropriate to a county, a city, and a city and county.” Contracting powers granted to municipal airports by general law seem clearly “appropriate.”

Section 93 provides for lease of city property, and in 1942 authorized “such lease for a period not to exceed twenty years, to the highest responsible bidder at the

⁹See also *San Francisco v. Boyd* (1941) 17 Cal.2d 606, 617, 110 P.2d 1036; *City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 995, 598-599, 212 P.2d 894; *The City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549, 103 P.2d 168.

highest monthly rent." Twenty years is the term of the TWA lease.¹⁰

Section 121 of the charter, reading now as it did in 1942, gives the Public Utilities Commission broad power to manage public utility *and other property* of the City, including the airport:

"The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

It is a familiar principle that a statutory authorization to a city to operate and manage municipally owned facilities includes power to provide by lease or contract for their use. This Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, involving a contract between the city and a steamship company regarding use of a city owned wharf, said in part (p. 652):

"We believe that the City of Juneau had power to enter into the contract. At the time of its execution the City had express legislative authority to 'purchase, construct, or otherwise acquire, establish, and operate public wharves.' Sec. 2383(4), Comp. Laws of Alaska, 1933, as amended by Chap. 48, Session Laws of Alaska, 1935. Incident to a power thus ex

¹⁰In 1942, sec. 93 contained no specific reference to the airport. Under an amendment, effective in 1946, that section now contains express authorization to lease or rent lands devoted to airport purposes (Cal.Stats. 1st Ex.Sess., 1946, c. 8, pp. 219, 221).

pressly granted is the power to make such contracts as are necessary to its effective exercise.”

In *Milwaukee County v. Town of Lake* (1951) 259 Wis. 208, 48 N.W.2d 1, the Supreme Court of Wisconsin approved the following statement by the trial court (48 N.W.2d 13):

“The contracts entered into between Milwaukee County and the common carrier passenger airlines concerning the use by the latter of the facilities of General Mitchell Field, are legal and valid and a proper exercise of the power of Milwaukee County in the management of General Mitchell Field.”¹¹

At the trial the City argued against the existence of its own power to contract by citing the first sentence of section 130 of the charter:

“The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction.”

The argument is that this language makes regulation mandatory, hence impliedly excludes contracting authority. But as already shown, the point cannot be carried by implication, since the home rule provisions of the state constitution give the City all powers over municipal affairs “not expressly forbidden * * * in the charter” (*West Coast Adver. Co. v. San Francisco* (1939) 14 Cal. 2d 516, 522, 95 P.2d 138, *supra*).

¹¹See also *Miami Beach Airline Service v. Crandon* (1947) 159 Fla. 504, 32 So.2d 153, 154, 155, involving Miami International Airport, and *Ex parte Houston* (1950) 93 Okl.Crim. 26, 224 P.2d 281, 290-291, 293, 299, 304-305, involving the Will Rogers Municipal Airport of Oklahoma City.

Further, if section 130 makes it mandatory for the City to regulate, the obvious question is—regulate what? The City answers—charges for facilities used in common by the airlines (Tr. 390). But there is no reason, we submit, to imply regulatory authority over such facilities which is not exercised over airport facilities used in common by other businesses, and no reason, we submit, to imply regulatory authority over common use facilities which the City disclaims as to other facilities of the airport (Tr. 390).

Further, the charter provision that the Commission shall have power to *regulate* does not mean that the City *must regulate* to the destruction of a contracting power otherwise granted. If law gives both regulatory and contracting powers, the powers are alternate and neither excludes the other.

In *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352 involving gas service, it was claimed that a charter proviso “that the council *should have the right* to ‘regulate and prescribe’ the rates and charges” (p. 359) was destructive of any power to contract about charges. The Supreme Court, overruling this contention, said (pp. 359-360):

“And in the present case, as the other provisions of the charter gave the City authority so to contract we must regard the proviso as merely an **alternative provision**; that is to say, we think that the City might **either contract** as to the rates, as an incident to its power of granting the right to construct and operate the public utility, **or** if it did not exercise this power to contract, might thereafter ‘**regulate** and prescribe the rates in the exercise of the governmental authority conferred by the proviso. **One power, however is not destructive of the other.** And where a munic

ipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding.”

To the same effect are many other cases cited *infra* 35-40.

8. Administrative construction.

Having shown the City's statutory (and, if material, charter) authority to make the agreement in suit, we turn to administrative construction. This has been long-continued and powerful, and would be entitled to great weight if the meaning of the statutory provisions were doubtful instead of clear.

Participating in the making of the agreement in suit were the Airport Manager, the Public Utilities Commission, the Public Utilities Manager, the Director of Property, the City Attorney and several of his staff, the Board of Supervisors, and the Mayor (Tr. 36-39, 277-279, 309-315, and *supra* 7-10). The instrument was executed after a public call for bids (Tr. 37-39); a procedure not appropriate to public utility rate making, and which in fact followed the charter procedure for making leases and contracts (Tr. 37-39).

The agreement describes itself as a “lease” (Tr. 14). It is contractual in character throughout. It says nothing about rate regulation. In its negotiation (Tr. 286, 308, 315) and by its terms (sec. 13, Tr. 28-29) the understanding was expressed that the contract charges were not subject to increase by the City. It makes no distinction between hangars and shop space on the one hand, and

common use facilities on the other. It says nothing of rental facilities, in distinction from rate facilities, nor does it purport to be divisible into a lease for hangars and shop space, and a public utility rate tariff for other facilities. To the contrary, it is expressly **not** divisible as concerns obligation. Section 22 provides (Tr. 34):

“22. Lessor agrees that, on payment of the rent and performance of the covenants and agreements on the part of the Lessee to be performed hereunder, Lessee shall peaceably have and enjoy *the leased premises and all the rights and privileges of said airport, its appurtenances and facilities.*”

The City expressly affirmed the original agreement by three separate supplements, the latest on June 2, 1948 (Tr. 43, 51, 54). It acted under the agreement until 1951 without question of its validity. When the Public Utilities Commission made a new schedule in 1946, it expressly excepted existing agreements (City Original Exhibit B). Where lease charges were altered to coincide with the schedule, as they were with respect to a few items, these changes were expressly effected as a matter of contract, and with express reaffirmance of the original 1942 lease (Tr. 45, 51, 53, 54).

In 1947, and notwithstanding that the 1946 schedule was in effect, the City made a term lease with United Airlines of similar nature to its agreement with TWA (Tr. 393), thus again affirming its power to contract.

And when in 1951 the Public Utilities Commission adopted the schedule which the trial court held effective to alter the 1942 TWA contract, the schedule itself was qualified to the contrary by its opening words, “*Except*

as otherwise provided, or amended by agreement" (Tr. 55).

Under these circumstances we submit as apt the following quotation from *U. S. v. Chicago North Shore R. Co.* (1932) 288 U.S. 1, involving a section of the Interstate Commerce Act (p. 13):

"It would be difficult indeed to conceive a clearer case of uniform administrative construction of §20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons" (citing many cases).¹²

We submit that the City's authority to make the contract in suit is unquestionably established, from which it follows, under the cases next to be cited, that the City has no right to set the contract aside under its regulatory powers if such exist.

B. A municipality having both contracting and regulatory powers, and having chosen in a given case to proceed by contract, is bound by that contract.

1. The authorities.

In *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, the city and the company had made a contract whereby the company was to serve the city's inhabitants with gas

¹²See also *Power Comm'n v. Panhandle Co.* (1949) 337 U.S. 498; *Brewster v. Gage* (1930) 280 U.S. 327; *Housing Authority v. City of Los Angeles* (1953) 40 Cal.2d 682, 256 P.2d 4; *Richfield Oil Corp. v. Crawford* (1952) 39 Cal.2d 729, 249 P.2d 600; *Palaske v. City of Long Beach* (1949) 93 Cal.App.2d 120, 129, 208 P.2d 764; *Nelson v. Dean* (1946) 27 Cal.2d 873, 168 P.2d 16; *Los Angeles v. Superior Court* (1941) 17 Cal.2d 707, 112 P.2d 10.

for a term of years at a rate not over a stated maximum. After several years' performance, the company tried to raise the rate, claiming that the contract rate had become confiscatory. In the case at bar it is the City, not the company, which is trying to raise the rate, but the basic legal contention was the same in the *St. Cloud* case as it is here, namely, that the subject matter involves public utility rate making, and therefore that the contract is not binding. The Supreme Court defined the issue thus (pp. 355-356):

“And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. *Southern Iowa Elec. Co. v. Chariton*, 255 U.S. 539, 542, and cases there cited; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 273; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. *Its solution turns upon the questions whether the City had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.*”

The Supreme Court then found that under the state statutes including the city charter the city had both contracting and regulatory authority. It held these powers nonexclusive, and further held that the city had made a contract and was bound by it (pp. 359-360):

“And in the present case, as the other provisions of the charter gave the City authority so to contract

we must regard the proviso as merely an alternative provision; that is to say, we think that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rates in the exercise of the governmental authority conferred by the proviso. *One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding.*"

Vicksburg v. Vicksburg Waterworks Co. (1907) 206 U.S. 496, involved a contract between the city and the water company covering two subjects, first, hydrant service to the city, and second, water service to the inhabitants. The contract fixed charges for both services and was for a 30-year term. It had been made under a Mississippi statute authorizing the city

"* * * 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties, who shall build and operate waterworks'" (206 U.S. 497).

Later the city tried to control the rates by ordinance, and the company filed suit. The Supreme Court sustained the contract. It pointed out that the city had contracting power under the Mississippi statute, and quoted from a Mississippi case (206 U.S. 511):

" 'The power to contract is an essential attribute of sovereignty and is of prime importance. Its exer-

cise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. *The power to contract implies the power to make a valid contract.*’ ”

Further, the Supreme Court said (pp. 515-516):

“In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg the right to make a contract for a supply of water, *it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and in the absence of a showing of unreasonableness ‘so gross,’ as the court of Mississippi has said, ‘as to strongly suggest fraud or corruption,’ this action of the council is binding, and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.*

While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city.”

The “former case” referred to in the above quotation is *Vicksburg v. Waterworks Co.* (1906) 202 U.S. 455. The two *Vicksburg* cases were followed in *Riverside A. Ry. Co. v. City of Riverside* (C.C.S.D.Cal. 1902) 111 Fed. 736. The court there granted an injunction based on

the due process and impairment of contract clauses, forbidding the city from shutting off electric power which it had agreed to furnish the street railway for a period of years under a contract. In the *Riverside* case the City was furnishing electricity to a privately owned common carrier; here the City is affording the use of airport facilities to the airlines. The parallel is obvious.

Even more closely in point is the decision of this Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, sustaining a contract between the city and a steamship company relative to the use of a municipally owned public wharf. This case is not quoted at this point for the reason that it is stated at length in the next subdivision of this brief in rebuttal of certain arguments and distinctions made by the trial court in its opinion (see *infra* 38-41).

In *R. R. Comm'n v. Los Angeles R. Co.* (1929) 280 U.S. 145, 151, 153, and in *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265, 273, the Supreme Court stated the same rule as the *St. Cloud* case and other cases cited above, but held that under particular California statutes the city had no power to contract as to street railway rates in the one case and telephone rates in the other. In the case at bar the contracting authority of the City is clear.

The legal rule developed in the foregoing line of cases is thus summarized in "The Supreme Court and the Contract Clause" (57 Harv.L.Rev. (1944) 512, 663):

"Many contracts concerning rates are made, not by the state itself, but by a municipality, and the controversy generally turns on whether under the state constitution the municipality had power to make the

contract. If it had, no question seems to arise as to its binding character. As stated by Justice Sanford in *St. Cloud Public Service Co. v. City of St. Cloud*, a state may authorize a municipality 'to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time.' How long a time would be 'grossly unreasonable' was not stated; the contract sustained in that case was for thirty years."

2. The trial court's distinction of the above authorities is not valid, and the authorities cited by the trial court are not in point.

The only distinction which has been offered of any of the foregoing authorities was stated as follows by the trial court, referring to the *St. Cloud* and *Home Telephone* cases (Tr. 175; 119 F.Supp. 520):

"The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated."

With greatest respect for the trial court, we submit that the above statement does not distinguish, but on the contrary emphasizes the controlling force of the decisions cited. A much stronger showing of statutory authority is needed to uphold a contract fixing rates which a public service corporation will charge the consuming public than to uphold a contract providing charges to be paid to the city itself by the user of a municipally owned facility. As so demonstrating, we cite Femmer v. City of Juneau (9 Cir. 1938) 97 F.2d 649.

The *Femmer* case involved a municipal wharf used by shipping generally; in the idiom of the case at bar, a common use facility. The contract sustained by the court was between the city and *one user* of the wharf, a steamship company—the exact type of contract which the trial court holds in the present case cannot be binding. Under Alaska law the City of Juneau had power to contract *implied* from its statutory authority to operate the wharf (97 F.2d 652, 654); the case at bar is stronger because the statutory contracting authority is *express*. The City of Juneau also had statutory authority to regulate public utility rates (Compiled Laws of Alaska 1933, sec. 2383). This Court upheld the contract, saying (p. 654):

“The power of the City to fix rates and charges for the use of municipally owned services is necessarily to be implied from the direction in subsection fourth of section 2383, as amended by Chap. 48, Session Laws of Alaska, 1935, to operate and maintain such public utilities, by ‘revenue collected for service rendered by such plants or utilities from the customers or users thereof.’ We have already seen that the power to make the Northland contract attached as an incident to the specific power to operate public wharves granted by this subsection. *Having the power to grant to Northland a right of user of the wharf and having the power to fix charges for such user the City ipso facto had the power to stipulate that during the duration of the contract the charge would remain constant.* Without such power the City could not have obtained a guaranty of a steady and sustaining patronage.”

The *Femmer* case not only sustained the contract, but also sustained it against the same kind of attack as San

Francisco makes here, namely, attempted exercise of a statutory authority to regulate rates. This Court said (p. 654):

“In connection with his argument on this point appellant has cited subsection tenth of section 2383 and section 2402, Comp.Laws of Alaska, 1933. Those statutes are not here applicable. This is not a case where the City has attempted to contract away its power to fix and from time to time change the rates to be charged by *private organizations* engaged in furnishing public services. Such action is prohibited by the cited sections. But the sections have no effect upon the power of the City to contractually fix the rate to be charged a user of a *municipally owned* public utility” (court’s emphasis).

A like distinction, i.e., between interference by a public authority with contracts of private persons and attempted rejection of contracts of its own is made by the Supreme Court in the gold clause cases of *Norman v. B. & O. R. Co.* (1935) 294 U.S. 240, and *Perry v. United States* (1935) 294 U.S. 330, decided the same day. In the *Perry* case the Court said (294 U.S. 350-351):

“There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.”

The above principle, applied by this Court in the *Femer* case to a situation completely analogous to that in the case at bar, is highly important. It brings out not only

the invalidity of the trial court's distinction of the *St. Cloud* case, but also the fundamental difference between the case at bar and the type of case relied on by the trial court in reaching the decision appealed from.

The typical situation in which regulatory commissions have been held authorized to set aside contracts is one wherein a privately owned utility and a consumer executed a contract for utility service before there was a regulatory statute, or before the statute made regulation mandatory. The cases hold that such a contract is made subject to the state's reserve power of future regulation, and therefore may be set aside when regulation comes. The cases relied on by the trial court are of this character (119 F. Supp. 520; Tr. 176-178).¹³ **None of them** involved contracts made by a municipality or other governmental body; therefore, they simply are not in point as the above quotation from the *Femmer* case makes clear (97 F. 2d 654). One of the cases cited by the trial court recognizes the same distinction (*Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232). Although the case held that the State had power to regulate a contract which private persons had made for the supply of water, the opinion went on to say (174 Cal. 238):

“We are speaking, of course, of a situation where the state cannot be held as matter of fact to have sur-

¹³For example, *Law v. Railroad Commission* (1921) 184 Cal. 737, 195 Pac. 423; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033; *Pinney & Boyle Co. v. L. A. Gas etc. Corp.* (1914) 168 Cal. 12, 141 Pac. 620; *Midland Co. v. K. C. Power Co.* (1937) 300 U.S. 109; *Union Dry Goods Co. v. Georgia P. S. Corp.* (1919) 248 U.S. 372.

rendered to the public utility involved, by something tantamount to a contract between it and the public utility, any portion of this regulatory power, which is the situation here.”

When San Francisco and TWA made the 1942 lease, the City had statutory power to contract concerning common use facilities of the airport; a power coexistent with regulatory power (if such existed). In the case of a municipally owned facility, unlike one privately owned, contracting power is not subordinate to regulatory power. The City, having exercised a valid contracting authority, cannot upset its own act by an exercise of regulatory power. This, we submit, is settled by the cases cited.

C. California cases dealing with municipal contracts generally.

The authorities cited in the last subdivision of this brief involved contracts comparable in subject matter with the contract in the case at bar, and demonstrate, we submit, that that contract was authorized and binding. Additionally there are many California cases dealing with municipal contracts generally and holding that a city cannot repudiate an authorized contract any more than an individual can.

In *Guy F. Atkinson Co. v. Offner* (1948) 86 Cal.App.2d 92, 194 P.2d 33, 34, the court said (86 Cal.App.2d 93-94):

“The city was empowered to enter into the contract the aim of which was to construct a public improvement indispensable to the general welfare. Having made the contract it is bound to the same extent and effect as a private individual.”

Chapman v. State (1894) 104 Cal. 690, 694, 38 Pac. 457, is one of several California cases which have quoted with approval from a New York case as follows:

“ ‘The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.’ ”¹⁴

D. The Federal and State constitutions prohibit the City from setting aside any portion of the contract in suit.

This being an authorized and valid contract, both its obligation and the property right inherent therein are constitutionally protected against the attempt of the City in this case to set the contract aside. Such action of the City would violate the impairment of contract clause in section 10 of Article I of the Federal constitution, and would violate the due process and equal protection clauses of the Fourteenth Amendment. It would also violate corresponding provisions of sections 13 and 16 of Article I of the Constitution of California.

¹⁴See also Civ.Code, sec. 1635; *M. F. Kemper Const. Co. v. City of L. A.* (1951) 37 Cal.2d 696, 235 P.2d 7; *Brown v. Town of Sebastopol* (1908) 153 Cal. 704, 96 Pac. 363; *Meyer v. State Land Settlement Board* (1929) 99 Cal.App. 337, 278 Pac. 452; *Hensler v. Los Angeles* (1954) 124 Cal.App.2d 71, 268 P.2d 12.

There are many cases supporting these constitutional objections to the City's action, but we need go no further at this point than to mention certain authorities already cited in support of the validity of the contract. These make the express point that municipal action in derogation of such a contract violates the Federal constitution in the particulars above referred to (see *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U.S. 496, 510; *Riverside & A. Ry. Co. v. City of Riverside* (C.C.S.D.Cal. 1902) 118 Fed. 736; *The Supreme Court and the Contract Clause* (57 Harv.L.Rev. (1944) 512, 663, and supra 33-40).) The principles stated by these authorities also show violation of corresponding state constitutional provisions.

II.

IF THE COURT WERE REQUIRED TO DECIDE WHETHER THE CITY HAS POWER TO TREAT CHARGES TO THE AIRLINES FOR COMMON USE FACILITIES AS PUBLIC UTILITY RATES, THE DECISION WOULD NECESSARILY BE IN THE NEGATIVE.

While submitting for reasons given that the City's contracting authority is decisive of this case, regardless of whether utility rate-making power exists or not, we submit that the latter power as here claimed by the City does not exist, and that the Court should so decide if the issue were material.

The City operates the airport in its proprietary capacity.¹⁵ It has broad powers of management; these are

¹⁵A California municipality acts in its proprietary capacity in conducting business enterprises for public benefit, including mu-

both essential and, we submit, sufficient as a matter of practical operation. They unquestionably include the power to make express contracts (*Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654), or to put out a price schedule for airport facilities. We submit that there is no good reason to imply an added governmental authority to be exercised under the police power; i.e., to fix charges to the airlines for certain facilities as public utility rates.

The airport's primary public is not a dozen airlines, but is the air-traveling public—2,500,000 air passengers in and out of San Francisco in 1952 (Tr. 374). The charges of the scheduled airlines are regulated by the Public Utilities Commission of California as to intrastate traffic and by the Federal Civil Aeronautics Board as to interstate traffic (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723; 49 U.S.C. 642). The City of course has no regulatory authority in the situations just mentioned. It argued to the trial court that certain provisions of the charter give the power claimed here. Without conceding that the charter is controlling, we point out that the City's argument not only conflicts with long-continued practical construction, but conflicts also with ex-

municipal airports (*Marin Water etc. Co. v. Town of Sausalito* (1914) 168 Cal. 587, 594-595, 143 Pac. 767; *South Pasadena v. Pasadena Land etc. Co.* (1908) 152 Cal. 579, 592, 593, 93 Pac. 490; *Pignet v. City of Santa Monica* (1938) 29 Cal.App.2d 286, 287, 84 P.2d 166 (involving Santa Monica airport, a tort case); *Coleman v. City of Oakland* (1930) 110 Cal.App. 715, 719-720, 295 Pac. 59 (Oakland airport, tort case)). In the case last cited the court said (110 Cal.App. 720):

“We have no hesitancy in deciding that in the conduct of an air port the municipality is acting in a proprietary capacity.”

press requirements of the charter concerning public utility rate making.

A. Analysis of charter provisions under which the City claims utility rate-making authority.

The City's argument for regulatory authority is to this effect: Under section 121 of the charter the airport is a "public utility"—an inaccurate but presently immaterial assumption, we submit (infra 50-53)—and under section 130 the Public Utilities Commission "shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction"; therefore the Commission may fix charges for common use facilities at the airport against the airlines as public utility rates.

The above argument, we submit, simply assumes the point in issue and fails completely when tested by the full text of the charter provisions, by the City's conduct, and by settled principles of law.

Note first that the supposed public utility is "*the airport*" (sec. 121). That is the subject of utility rate regulation, if regulatory power exists. But most airport charges and activities are *not* regulated (Tr. 384-393). The City is *not* asserting utility rate-fixing authority over the airport, or all its facilities or all businesses using it but over *part* of the facilities used by *one group of users*—aircraft operators, principally the scheduled airlines. The City is saying that the charter gives rate-making authority over *facilities used in common by airlines*, but not over facilities used in common by others, such as limousine, bus and taxi companies. Also the City is saying that the air

lines are a "public" which must pay public utility rates. But the charter says none of these things, and they cannot be implied because public utility rate-fixing power cannot be established by implication. In *Siler v. Louisville & Nashville R.R. Co.* (1909) 213 U.S. 175, 194, the Supreme Court said:

"The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction."

The claim for utility rate-fixing authority not only rests on implication but on unreasonable implication; in which regard we refer first to the fourth paragraph of section 130 of the charter:

"Rates for **each utility** shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, **all expenses** of every kind and nature incident to the operation and maintenance of **said utility**, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; * * *."

This language requires rates to be fixed for "each utility," in this case, if the City's contention be accepted, *the airport*. But the City does not fix rates for the airport; it is trying to fix them only for facilities of common use by the airlines. If it has a right to do so, then the charter requires that rates for such use be set in amounts to yield **all expenses** of operation and maintenance "of **said utility**," i.e., the airport, plus interest and amortization of airport bonds; in other words, that the rates be so set that facilities of common use by the airlines will pay all the airport expenses; obviously an impossible

proposition. In fact a great part of airport revenue comes, and presumably always will come, from concessions and other unregulated enterprises (Def. Exh. G; original Exhibit; see Tr. 488, 721).

Section 130 further provides that if the Commission proposes a schedule "for said utility which shall not produce such revenue," i.e., all expenses of the airport plus bond interest and amortization, the Board of Supervisors may, by a two-thirds vote, approve the schedule nevertheless "and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet *such deficit*." The Board certainly would not make a tax levy for the difference between the revenues from the airlines for common use facilities and the entire expense of the airport. It would have to consider the entire revenues, most sources of which are admittedly not subject to utility rate regulation (Tr. 242, 390).

While the foregoing section of the charter (130) does not use the word "airport," it does provide conditions to the fixing of public utility rates. Since these conditions cannot be fulfilled with respect to "rates" for the common use facilities, it follows that power to regulate these "rates" cannot be implied from section 121 of the charter, as the City contends.

As noted before, airline charges to the traveling and shipping *public* are regulated by state or federal authority. Compared with the millions of individuals and businesses served at the airport, the airlines are numerically a tiny group. We do not contend that the existence of a public utility relationship between utility and customer depends wholly on the number of the "public" served, but

do point out such status usually involves a broad public, for example, the customers of a city's water service or municipal railway. Practical necessity requires that public utility status be imposed in such cases, but there is no corresponding need for it in the case at bar and no reason to bring it into existence by strained implications from the statutes.

The name "Public Utilities Commission" should not obscure the fact that the Commission is a managerial as well as a regulatory body, and that its managerial functions extend to **nonutility** as well as utility properties. Section 121 of the charter gives the Commission management and control

"* * * of all public utilities *and other properties* used, owned, acquired, leased or constructed by the city and county, including airports."

In section 130 half the first sentence deals with regulatory authority (in general terms, not with relation to the airport), and the second half with managerial powers unrelated to rate making, such as collecting charges, discontinuing service, and settling tort claims—again showing that the fact that the Public Utilities Commission has power to do something is not decisive of whether its action is managerial or regulatory or of whether the property concerned is or is not a "public utility."

B. Settled principles of statutory construction and long-continued administrative construction of the charter are against the City's claim of rate-making authority.

We have quoted *Siler v. Louisville & Nashville R.R. Co.* (1909) 213 U.S. 175, 194, to the point that public utility

status can only be established by clear statutory language and not by implication.

See, also, *Interstate Com. Commission v. Railway Co.* (1897) 167 U.S. 479, 493, 494-495, 505, and, in California, *Allen v. Railroad Commission* (1918) 179 Cal. 68, 85, 175 Pac. 466; *Van Hoosear v. Railroad Commission* (1920) 184 Cal. 553, 555, 194 Pac. 1003; *Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 733, 227 P.2d 256.

In the case at bar the power claimed by the City not only rests on implication unreasonable under charter provisions, but is also contrary to long-continued administrative construction. We will not repeat things already said on the latter subject (*supra* 31-33), but do point out that whereas some of this construction would not be inconsistent with a power of utility rate regulation *coexisting* with power to contract, *none* of it harmonizes with an *exclusive* rate-making power, and some of it cannot be reconciled with the existence of a utility rate-making power at all.

C. The City's assumption that the airport is a "public utility" for municipal rate-making purposes is not valid, but if it were would not sustain the power here claimed.

As shown, the City's claim of rate-making authority starts with the assumption that the airport is a public utility. While submitting that the assumption is immaterial, we also submit that it is not valid.

Quoting again the first paragraph of section 121 of the charter:

"The public utilities commission shall have charge of the construction, management, supervision, main-

tenance, extension, operation and control of all public utilities **and other properties** used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

Whether the airport is included in "public utilities" or in "other properties," it is in either case used "for the purpose of supplying * * * public utility service," since it provides means whereby the scheduled airlines render common-carrier transportation service to the public, including "inhabitants of the City." Further the airport serves "inhabitants" of the City who are not airline passengers or shippers; this because of the large amount of money which the airport brings to San Francisco and its tremendous stimulation of commerce generally. In all these respects it unquestionably fulfills a "public purpose," but *public purpose* and *public utility* are not synonymous terms (see *Ex Parte Houston* (1950) 93 Okl. Crim. 26, 224 P.2d 281, 304, an airport case). As already shown, no inference on this subject follows from the connection between the airport and the Public Utilities Commission, since the Commission has functions of management as well as regulation, and deals with both utility and nonutility properties.

On fair construction, we submit that the charter puts the airport among nonutility properties to which section 21 refers, (1) for the reasons just given; (2) because of long-continued administrative construction; (3) because the whole pattern of section 130 of the charter providing

for rate regulation of "utilities" is inapplicable to the airport; (4) because public utility status "is never presumed 'without evidence of unequivocal intention'" (*Allen v. Railroad Commission* (1918) 179 Cal. 68, 85, 179 Pac. 466, and authorities supra); and (5) because the airport is in San Mateo County, and a California municipality has no extraterritorial powers of regulation except as expressly conferred by statute (*City of Oakland v. Brock* (1937) 8 Cal.2d 639, 641, 67 P.2d 344; *Mulville v. City of San Diego* (1920) 183 Cal. 734, 737, 192 Pac. 702) and the charter provisions invoked in this regard by the City are reasonably to be read as applying only to extra-territorial *proprietary* functions.

We have found no case in any jurisdiction holding that the subject of this suit, i.e., charges to the airlines for airport facilities, is a matter for municipal rate regulation. Municipal corporations, of course, have no general rate-regulating powers over airports. A few cases have said that an airport is a public utility, but in all these the situations of fact and law were different than here. For example, *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N.E.2d 656, cited in the trial court's opinion (Tr. 171), did not involve rate regulation but whether the "airport property was exempt from taxation."

But even if the airport were a public utility, that fact would not answer the question in the case at bar. Even privately owned public utilities normally contract for services *rendered to them*, and this is a matter of management beyond the reach of regulation, even where both contracting parties are privately owned public utilities (*Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822, 215 P.2d 441; *Marin etc. Water Co. v. Town*

Sausalito (1914) 168 Cal. 587, 596, 143 Pac. 767; *City of Des Moines v. City of West Des Moines* (1948) 239 Iowa 1, 30 N.W.2d 500, 504). The airport can make public transportation service available only through the scheduled airlines, and their operations involve just as much a service by them to the airport as a service by the airport to them. Further, and this point is fundamental, the City had statutory authority to make the agreement which it is now trying to set aside by exercise of regulatory power. The authorities, we submit, conclusively show that this cannot be done whether the airport is a public utility or not (*supra* 33-40).

III.

EVEN IF THE CONTRACT WERE VOIDABLE BY THE EXERCISE OF UTILITY RATE-MAKING POWER, STILL THE PRESENT JUDGMENT COULD NOT STAND BECAUSE THE CITY HAS NOT TAKEN ACTION SUFFICIENT TO AVOID THE CONTRACT.

We have so far argued that the agreement of October 1, 1942, being valid, cannot be avoided by utility rate-fixing authority even if the City has such authority. But if the agreement were voidable by regulatory authority (which we deny), the Public Utilities Commission has not avoided it.

- A. The trial court held that the 1951 schedule of the City Public Utilities Commission partially superseded the 1942 agreement, but the schedule itself expressly excepted existing agreements from its operation.

As said before, the schedule of the City's Public Utilities Commission effective January 1, 1951, commenced as follows (Tr. 55):

“Except as otherwise provided, or amended by agreement, the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport.”

The meaning of this provision is too clear, we submit to permit of argument. Under it the schedule simply cannot have partially or at all superseded the contract in suit as adjudged by the decree below.

B. The contract even if voidable, would not be avoided unless and until the Public Utilities Commission made an express finding after hearing that the contract is unreasonable and against public interest. There has been no such hearing or finding.

The 1951 schedule would not avoid the 1942 contract even if it had not expressly excepted the existing agreement from its operation. We have, we submit, demonstrated that the City had authority to make this agreement and that it could not under any circumstances be superseded by municipal regulation. However, even in cases involving contracts which might be set aside under the power of utility rate regulation—the type of case relied on by the trial court, but completely distinguishable from the case at bar (*supra* 40-42), the courts have held that a utility rate contract is not impaired by a unilateral filing of new rates unless the statute expressly so provides. The contract continues operative unless and until the regulatory body holds a hearing *on that contract* and makes an *express finding* that the contract is unreasonable and contrary to public interest. The cases to this effect are very numerous, as shown in the

footnote, but the rule can be brought out by brief quotations from two or three.¹⁶

In *Wichita R. R. v. Pub. Util. Comm.* (1922) 260 U.S. 3, a utility and its customer made a contract for furnishing electric service at agreed rates. Thereafter the utility filed an increased schedule with the State Public Utilities Commission, which approved the schedule but without any finding that the contract rates were unreasonable. The Supreme Court held that the contract would continue in effect until such finding after due hearing could be made. The Court quoted from the Kansas case of *Kaul v. American Independent Telephone Co.* (1915) 9 Kan. 1, 147 Pac. 1130 (260 U.S. 58):

“The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the con-

¹⁶*Allen W. Hinkel Dry Goods Co. v. Wichison I. Gas Co.* (10 Cir. 1933) 64 F.2d 881, 883; *Attleboro Steam & E. Co. v. Narragansett E. Light Co.* (D.R.I. 1924) 295 Fed. 895, 901, 903; *Jefferson Deposit Co. v. Central Illinois Light Co.* (1923) 309 Ill. 262, 10 N.E. 817, 819, 820; *Western Distributing Co. v. City of Mulvane* (1924) 116 Kan. 472, 227 Pac. 362, 363; *Traverse City v. Citizens' Telephone Co.* (1917) 195 Mich. 373, 161 N.W. 983, 988; *Putland Ry., Light & Power Co. v. Burditt Bros.* (1920) 94 Vt. 41, 111 Atl. 582; *Commonwealth v. Shenandoah River Light & Power Corp.* (1923) 135 Va. 47, 115 S.E. 695, 702-703.

See also *Lamb v. Calif. Water & Tel. Co.* (1942) 21 Cal.2d 33, 129 P.2d 371; *Southern Pac. Co. v. Spring Valley W. Co.* (1916) 173 Cal. 291, 298, 159 Pac. 865.

The recent case of *Tyler Gas Service Co. v. United States Gas Pipe Line Co.* (5 Cir. 1954) 217 F.2d 73, upheld impairment of a contract by a rate schedule but on the ground that the statute so required. The *Mobile* case (215 F.2d 883) to which it refers is stated in the text. See also *Sierra Pacific Power Co. v. Federal Power Commission* (App.D.C. Feb. 24, 1955) 23 U.S. Law Week 33, 2441.

tract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Supreme Court further said (260 U.S. 58):

"We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void."

The *Wichita* case was cited in *Mobile Gas Service Corp. v. Federal Power Commission* (3 Cir. 1954) 215 F.2d 883, certiorari granted (Feb.28, 1955, Nos. 436 and 556, October term 1954). There a utility and a customer had made a wholesale gas contract which the utility tried to avoid by filing a rate schedule containing increased charges. The Federal Power Commission accepted the filing. The court nevertheless held the utility liable for schedule rates collected in excess of contract charges in the absence of an express finding by the Commission that the contract was unreasonable. The Commission urged that no such finding was necessary. The court, holding otherwise, said (p. 889):

"So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable."

After quoting from *Colorado Interstate Gas Co. v. Federal Power Com'n* (10 Cir. 1944) 142 F.2d 943, 954

hat "Such rates and charges could be modified only after an express finding of unreasonableness," the court said (215 F.2d 892):

"Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile."

The above case was followed by the Court of Appeals of the District of Columbia in *Sierra Pacific Power Co. v. Federal Power Commission* (App.D.C. Feb. 24, 1955) 3 U.S. Law Week 1133, 2441. This case had not appeared in the Federal Reporter when this brief went to the printer. The filing provisions of the Power Act involved in the *Sierra Pacific* case and the Natural Gas Act involved in the *Mobile* case are very similar.

CONCLUSION.

The judgment appealed from holds that a schedule of the City Public Utilities Commission effective January 1, 1951, is a public utility rate order which partially set aside and superseded the lease-contract of October 1, 1942, between the City and TWA. We submit, for the reasons and under the authorities cited in this brief, that the judgment cannot be supported on any basis or from any point of view. Even if the 1951 schedule was an authorized rate order, which we submit it was not, and even if

it had purported to affect the agreement in suit, instead of providing the contrary by an express exception—still the basic and controlling fact remains that the City, when it made this contract in 1942, had statutory authority to do so, and under settled principles of law cannot set the contract aside by any exercise of regulatory authority.

We respectfully submit that the judgment should be reversed with directions to enter a declaratory judgment sustaining the validity of the contract and its binding force for its whole term.

Dated, San Francisco, California,

March 30, 1955.

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(Appendix Follows.)

Appendix.



Appendix

CONSTITUTION OF THE STATE OF CALIFORNIA

Article XI, Section 6:

“Municipal corporations

Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed; and the Legislature may, by general laws, provide for the performance by county officers of certain of the municipal functions of cities and towns so incorporated, whenever a majority of the electors of any such city or town voting at a general or special election shall so determine. Cities and towns heretofore organized or incorporated may become organized under the general laws passed for that purpose, whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith. Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. Cities and towns heretofore or hereafter organized

by authority of this Constitution may, by charter provision or amendment, provide for the performance by county officers of certain of their municipal functions, whenever the discharge of such municipal functions by county officers is authorized by general laws or by the provisions of a county charter framed and adopted by authority of this Constitution.”

Article XI, section 8(j) (in part):

“Municipal Affairs

It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.”

**CALIFORNIA MUNICIPAL AND COUNTY
AIRPORT LAW**

Cal. Stats. 1927, c. 267, p. 485:

“Section 1. Any city and county, or county, or city operating under a freeholders’ charter, or otherwise, or any town, or any municipal corporation, in the State of California, is hereby authorized and empowered to acquire by purchase, condemnation, donation, lease or otherwise real or personal property, or to use any real property owned by it, or which it may hereafter acquire, within or without its corporate limits for a site upon which an airport or airports may be maintained and upon which any such city and county or county or city or town or

municipal corporation may erect and maintain or permit the erection and maintenance of hangars, mooring masts, flying fields, and all places for flying take-off and landing of aircraft and the storage of the same when not in active use, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient, and to levy taxes for the purpose of raising funds to acquire lands for the purposes mentioned in this act and to pay the principal and interest of any bonds issued pursuant hereto.

Any lands previously acquired by any such city and county, or county or city operating under a freeholders' charter or otherwise, or any town or any municipal corporation in the State of California for park purposes, may be used for any of the purposes in this section specified; it being hereby specifically declared that the purpose specified in this section shall constitute park purposes.

The foregoing sentence shall not be construed to limit or confine the uses specified in this section to lands acquired for park purposes.

Section 2. [Provides for incurring indebtedness to carry out purposes of Section 1.]

Section 3. [Provides procedure for issuance of bonds for airport purposes.]

Section 4. In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county, or county, or city operating under a freeholders charter or otherwise, or

town, or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal, the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith, to own and operate municipal aircraft, to employ pilots, to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport, to perform any duties necessary or convenient for the regulation of air traffic, to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

Section 5. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.”

(Repealed, Cal. Stats. 1949, c. 81, sec. 3, p. 327, except sec. 3. See, however, Government Code secs. 50,470 et seq., reprinted infra, based on the foregoing statute and effective in 1949.)

CALIFORNIA GOVERNMENT CODE

Section 50001:

“ ‘Local agency.’ ‘Local agency’ as used in this division means county, city, or city and county, unless the context otherwise requires.”

Section 50470.

“Right to acquire and use property for airport: Erection and maintenance of air navigation facilities. Whether governed under general laws or charter, a local agency may acquire property by purchase, condemnation, donation, lease, or otherwise for the purposes of this article and may use any real property which it owns or acquires within or without its limits as a site for an airport. The local agency may erect and maintain hangars, mooring masts, flying fields, and places for flying, take-off, landing, and storage of aircraft, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures, and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient.”

Section 50474.

“Powers in connection with erection or maintenance of airports and facilities. In connection with the erection or maintenance of such airports or facilities, a local agency may:

(a) Regulate the receipt, deposit, and removal, and the embarkation or debarkation of passengers or property to and from such landing places or moorage.

(b) Exact charges, fees, and tolls, and enforce liens or their payment.

(c) Lease or assign for operation any space and any necessary or useful appurtenances, appliances, or other conveniences.

(d) Own and operate aircraft.

(e) Employ pilots.

(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport.

(g) Perform any duties necessary or convenient for the regulation of air traffic.

(h) Enter into contracts or otherwise cooperate with the Federal Government or other public or private agencies.

(i) Exercise powers necessary or convenient in the promotion of aeronautics and commerce and navigation by air."

Section 50475.

"Contracts with State or United States: Leases, licenses etc. A local agency operating or maintaining an airport may grant leases, licenses, concessions, and other privileges, regarding aviation facilities to the State or the United States, for the use or occupation of hangars, structures, work, or other aviation facilities by the War Department, Navy Department, National Guard, or other state or federal departments or agencies in connection with aviation or air commerce."

Section 50476.

"Same: Acquisition or construction of airport facilities The legislative body may acquire or construct hangars, structures, works, or other facilities on the airport re

quired for such uses and may enter into contracts with the State or the United States.”

Section 50477.

“**Same: Duration of term.** The contracts, leases, licenses, concessions, or privileges shall be subject to the same limitations as to duration of term provided by law for the granting of leases, licenses, concessions, or privileges to, or the entering into of contracts with, private persons or agencies.”

Section 50478 (Added by Stats. 1951, c. 1018).

“**Power to lease property for airport purposes or purposes incidental to aircraft: Maximum term.** A local agency may lease or sublease property owned, leased, or otherwise controlled by it for not to exceed 50 years for airport purposes or purposes incidental to aircraft, including:

(a) Manufacture of aircraft, airplane engines, and aircraft equipment, parts, and accessories.

(b) Construction and maintenance of hangars, mooring masts, flying fields, signal lights, radio equipment, service shops, conveniences, appliances, works, structures, and other air navigation, aircraft, and airplane engine manufacturing plants and facilities.”

CALIFORNIA GOVERNMENT CODE

Section 26020 (in part):

“**Authority of supervisors concerning airports.** As a necessary adjunct to aerial transportation and the use of

aerial highways, the board of supervisors may provide and maintain public airports and landing places for aerial traffic for the use of the public. For such purposes the board of supervisors may:

(a) Acquire by purchase, condemnation, donation, lease, or otherwise real or personal property, either within or without the incorporated territory of municipalities, necessary for such purposes, and improve, construct, reconstruct, lease, furnish, refurnish, use, repair, maintain, and control the property, including buildings, structures, and lighting and other equipment and facilities necessary for such use."

(Effective 1947 this section supersedes similar provision in former Political Code section 4056c.)

CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO

Cal. Stats. 1931, c. 56, pp. 2978-2980:

"Powers of the City and County.

Section 2 [in part]. The City and County of San Francisco * * * may, subject to the restrictions contained in this charter, purchase, receive, hold and enjoy, sell, lease and convey real and personal property. * * *

* * * *

The city and county may make and enforce all laws, ordinances and regulations necessary, convenient or incidental to the exercise of all rights and powers in respect to its affairs, officers and employees, and shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and lim-

itations provided in this charter, including the power to acquire and construct plants, works, utilities, areas, highways and institutions outside the boundaries of the city and county, and maintenance and operation of the same, and the exercise of functions or maintenance of services outside the boundaries of the city and county, including the expenditure of funds therefor through any agency. The specification or enumeration in this charter of particular powers shall not be exclusive. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors.”

“Lease of City Property.

Section 93 [as worded on October 1, 1942, Cal. Stats. 1931, p. 3035]. When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease.

The public utilities commission may provide, by resolution, that agricultural or other lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural purposes shall be subject to lease and administration by the operating forces of the water department; provided, however, that no such lease shall be made to any other public utility without

the approval of the board of supervisors by two-thirds vote thereof."

"Lease of City Property.

Section 93 [as amended and in effect today. See Cal. Stats. 1st Ex. Sess. 1946, c. 8, pp. 221-222]. When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for the purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder at the highest monthly rent. The director of property shall collect rents due under such lease.

The public utilities commission may provide, by resolution, that agricultural or other lands used and useful for water department purposes and at the same time available for leasing or rental for agricultural or other purposes shall be subject to lease and administration by the operating forces of the water department, and further, the public utilities commission may provide, by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission; provided, however, that no such lease shall be made to any other public utility with-

out the approval of the board of supervisors by two-thirds vote thereof."

Cal. Stats. 1931, c. 56, pp. 3047-3048.

"General Powers and Duties of Commission.

Section 121. The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof.

The commission shall locate and determine the character and type of all construction and additions, betterments and extensions to utilities under its control, and shall determine the policy for such construction or the making of such additions, betterments and extensions from the public funds under its jurisdiction; provided that in each such case it shall secure the recommendation of the manager of utilities, which shall be presented in writing and shall include analyses of cost, service and estimated revenues of all proposed or feasible alternatives in cases where it is deemed by the manager that such alternatives exist.

The commission shall also have power to enter into contract for the furnishing of heat, light and power for municipal purposes, and to supervise the performance and check the monthly bills under such contract.

The commission shall have full power and authority to enter into such arrangements and agreements as it shall deem proper for the joint use with any other person, firm or corporation owning or having jurisdiction over poles, conduits, towers, stations, aqueducts, reservoirs and tracks for the operation of any of the utilities under its jurisdiction. It may make such arrangements as it shall deem proper for the exchange of transfer privileges with any privately owned transportation company or system which shall tend toward the betterment of transportation service.

The commission shall observe all city and county ordinances and the regulations of the department of public works relative to utility openings, structures and poles in streets and other public places, as well as all ordinances and regulations relative to barricades, construction lights, refilling excavations and replacing and maintaining street pavements; and in connection with all such matters the said commission shall be subject to the same inspection rules and pay fees to the proper department in the same manner and at the same rates as any private person or corporation.

The commission shall have charge of all valuation work relative or incidental to purchase proceedings initiated by the city and county for the acquisition of any public utility.

Foreign trade zones, as may be authorized by acts of Congress to be located in the city and county, are hereby declared to be public utilities within the meaning of this charter. A bonded indebtedness for the construction, completion or acquisition of foreign trade zones and the ac-

quisition of necessary lands, buildings, and equipment authorized by the electors in accordance with the provisions of this charter shall be exclusive of the bonded indebtedness of the city and county limited by this charter."

Cal.Stats. 1931, c. 56, pp. 3051-3052.

"Rates.

Section 130. The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers, and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service. Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges.

Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the

succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit. All other changes in rates, charges or fares as proposed by the commission shall be submitted by the commission to the board of supervisors for approval, and, except as in this section otherwise provided, it shall require a two-thirds vote of the board of supervisors to reject the rate changes as proposed by the commission, and if so rejected, such proposed changes in schedules of rates, charges or fares shall be returned to the commission for revision. If the supervisors shall fail to act on any such proposed schedule within thirty days, the schedule shall thereupon become effective."

FEDERAL CIVIL AERONAUTICS ACT OF 1938
49 U.S.C. 642:

"Complaints to and investigations by Board [Civil Aeronautics Board]

* * * * *

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or

charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

No. 14,523

United States Court of Appeals
For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,

Appellees.

BRIEF FOR APPELLEES.

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United States Court of Appeals For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,

Appellees.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This is an appeal from a decree entered on July 2, 1954, by the District Court for the Northern District, Southern Division, denying plaintiff-appellant declaratory and injunctive relief and awarding defendant-appellee on its cross-complaint declaratory relief and money judgment in the sum of \$95,942.64. The District Court's jurisdiction was founded on 28 U.S.C. 1332.¹

¹For convenience, the parties will hereafter be referred to as "TWA and the "City". All emphasis supplied unless otherwise noted.

It is admitted in the pleadings that TWA is a Delaware corporation (Tr. 3); that the City is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of California (Tr. 4); and that the amount in controversy exceeds \$3,000.00 (Tr. 3-4). This Court's jurisdiction rests on 28 U.S.C. 1291, 2201.

STATEMENT OF THE CASE.

In 1926 the voters of the City and County of San Francisco approved an appropriation of \$100,000.00 for the construction of an airport. From that relatively humble beginning, there has been created on about 4,000 acres, the San Francisco International Airport at a cost to the taxpayers of this City of approximately \$50,000,000.00.

Four times, in the ownership and operation of this airport, the City has expanded and rebuilt this utility, to accommodate larger and heavier aircraft progressively put in use by air carriers, including TWA.

In 1942 there were no aircraft operated by scheduled air lines in the United States exceeding 25,500 pounds in weight (Tr. 476). In 1947 the initial Constellation plane placed in service by TWA weighed approximately 77,000 pounds (Tr. 470). In 1952 Constellation planes were regularly operated by TWA at San Francisco Airport of a maximum gross weight of 120,000 pounds (Tr. 470). A Lockheed Constellation of a maximum weight of 130,000 pounds was as

of the time of the trial of this action contemplated to be utilized in service (Tr. 471).

In 1942 the capital investment at the airport amounted to \$2,900,000 (Tr. 345). In October, 1953, the capital investment at the airport amounted to approximately \$40,000,000.00 (Tr. 345). Between October, 1942, and December, 1951, approximately \$24,000,000.00 was expended in repairing common use facilities at the airport (Tr. 528) and a major portion of this expenditure was for the purpose of lengthening and strengthening the runways at the airport in order to safely accommodate planes of increased weight (Tr. 520, 521, 523, 525).

Today the City is confronted with TWA's idea that it is not susceptible to utility rates for common use facilities that apply to all airline carriers entering and using the San Francisco International Airport.

The City maintains that in the operation of the airport it is conducting a public utility and must as a matter of law treat all users of the airport on an equal basis.

On the 23rd day of June, 1941, the City promulgated and passed a schedule of rates, after due notice by publication and hearing, that were thereafter incorporated verbatim into the lease agreement with TWA. As far as TWA is concerned, it is a public record that the Public Utilities Commission of the City and County of San Francisco² had exercised its

²The Public Utilities Commission of the City and County of San Francisco was created pursuant to Section 120 of the City's Charter

legislative power and had promulgated and passed utility rates for common use facilities at the airport (Exh. R-1, R-2, R-3, R-4, Tr. 623).

The enactment of said schedule of rates and charges was made pursuant to the provisions of Section 130 of the Charter of the City and County of San Francisco, after publication in the official newspaper for five days of notice of intention so to do, and after public hearing held not less than ten days after the last publication. In accordance with the notice, the Public Utilities Commission of the City and County of San Francisco adopted a schedule of rates and charges to be paid by aircraft lines for use of common use facilities at the San Francisco Airport. The Board of Supervisors, in accordance with the Charter section, approved the schedule of rates and charges on June 30, 1941, and the same was placed in effect by the Public Utilities Commission on July 1, 1941.

In 1946, the City again promulgated a schedule of rates and charges, after due notice by publication and hearing, in accordance with Charter Section 130 (Exh. S-1, S-2, S-3, S-4, Tr. 624).

(effective January 8, 1932). Under Section 121 of the Charter the Commission has the control and management of municipally owned utilities. This Commission is distinct and separate from the public Utilities Commission of California. The Railroad Commission of the State of California was continued in existence as the Public Utilities Commission of the State of California by amendment to Article XII, Section 22 of the California Constitution adopted November 5, 1946. The Public Utilities Commission of California does not govern rates and charges of municipally owned utilities of San Francisco. See more details in Section II of this brief.

On November 12, 1950, the Public Utilities Commission adopted a schedule of rates and charges, again after due notice by publication and hearing, for the common use facilities, in accordance with Section 130 of the Charter. Said schedule was approved by the Board of Supervisors and became effective on January 1, 1951 (Exh. E, Tr. 55; Exh. T-1, T-2, T-3, T-4, Tr. 625).

In 1942, the agreement now before the Court was entered into between City and TWA, whereby certain lands were leased to TWA for a period of twenty years. Incorporated in the agreement was this provision, and it is fully set forth hereafter to emphasize its importance in the controversy at bar. Section 3 of the agreement states:

“Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and on the same terms and conditions as apply to others, of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings, and takeoffs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and con-

tractors, patrons, and invitees, which use, without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):”

TWA refuses to recognize the significance of the conditions of Section 3 of the agreement.

Twelve (12) airline carriers, as well as non-scheduled airlines and privately owned planes, are using the common use facilities (Tr. 373; 360, 361) at the San Francisco International Airport under the schedule of rates and charges of 1951, with the exception of TWA and United Air Lines (the United case is also being contested in the District Court). Paying for the common use facilities under the rates and charges promulgated by the Public Utilities Commission is recognized by the airline carriers (other than TWA and United) as well as non-scheduled airlines and privately owned planes.

TWA assumes the position that it is entitled to preferential treatment and that it is not subject to the rates and charges duly enacted by the Public Utilities Commission and the Board of Supervisors that became effective January 1, 1951, because of the agreement of 1942.

The City, on the other hand, states that in the operation of the airport it is conducting a public utility and that all air carriers must be treated alike in the payment of rates and charges for the use of the common use facilities.

Further, the City maintains that, regardless of a purported special contract, all airline carriers are entitled to equal and non-discriminatory rates for common use facilities. An unfair preference in the fixation of rates would exist if one airline carrier could say to its next door competitor, "Our rates for common use facilities are different (lower) from those imposed upon your operation."

Upon the face, such practice is at variance from the fundamental rule applicable to public utilities. That rule is that consumers must be treated alike, and any transaction creative of discrimination or design to place consumers upon an unequal footing is stamped as void.

QUESTIONS PRESENTED.

The City feels that the District Court simplified the questions to be considered by this Honorable Court. The City accepts the District Court's opinion and relies upon its conclusions and the judgment rendered in the instant matter. (The District Court's opinion, *Trans World Airlines vs. City and County of San Francisco*, 119 F. Supp. 516, is printed in the Appendix to this brief.)

Summarized, the issues are reduced to the following propositions:

(1) The operation of common use facilities at the airport is a public utility business.

(2) The Public Utilities Commission of the City and County of San Francisco is the rate fixing body

and its rate fixing power is fully equivalent in legal effect to the exercise of such power by any rate fixing body.

(3) The law does not permit departure from this regular schedule of rates and charges by either previous or subsequent contract.

(4) The terms of the TWA agreement are such as to subject rates and charges for common use facilities to the general schedule of rates and charges in effect at the airport.

ARGUMENT.

I.

THE OPERATION OF COMMON USE FACILITIES IS A PUBLIC UTILITY BUSINESS.

In the total design of the airport, common use facilities are installed, which are available in the operation of all aircraft. These are the runways, where airplanes land and take off; the loading aprons or ramps, where passengers and cargo are taken on and discharged; and the taxiways, which connect the runways with the loading aprons or ramps; the lighting system, and the public address system (Tr. 359, 360). The right of TWA to utilize the facilities just mentioned is set forth in Section 3 of the Lease "in common with others authorized so to do and *on the same terms and conditions as apply to others.*"

In Section IV of this brief, we point to the precise language of the TWA lease disclosing the absence of

intent to “freeze” the charges for these common use facilities. Conceding, however, for the purpose of present argument, that there was such intent, the law is clear that the attempt to “freeze” the charges is void.

Mindful of the force of this broad principle of public utilities law—that all customers must be treated alike—the main endeavor of TWA is to negate the presence of a public utility function. This is easily met.

A. Charter Provisions Establish Airport as Public Utility.

Section 120 of the Charter of the City and County of San Francisco creates a public utilities commission in the municipal government of the City and County of San Francisco.

Section 121 of the *Charter* provides in part that:

“The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, *including airports*, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof.”

Section 122 of the *Charter* enacts that utilities therein named, among which is the airport, “shall each be designated as a department under the commission.”

Section 125 of the *Charter* provides, in part:

“The public utilities commission shall have jurisdiction over the airport now being conducted by the City and County of San Francisco, . . .”

The airport being conducted at the time of the adoption of the present San Francisco Charter, going into effect January 8, 1932, is the present San Francisco International Airport. As heretofore pointed out, this airport was started in the year 1926. There can be no doubt, therefore, that the airport has been designated as a public utility by Charter.

Even in the absence of such Charter provision the ordinary rule of law is that the operation of an airport is the operation of a public utility. This will amply be demonstrated in the authorities to follow.

B. Number of Patrons Does Not Determine Public Utility.

Since the activity at the airport is in the public utility field, it follows that the customers, in patronage of that utility, must be the airlines themselves—twelve scheduled airlines, non-scheduled or irregular airlines, and owners of private planes (Tr. 373; 360-361).

From the scope of operations, a public utility may be limited in the number of persons who are entitled to be served. From the nature of the service rendered, the persons who are in a position to require the same may be few in number.

As stated in *Terminal Taxicab Company v. Kuntz* (1916), 241 U. S. 252, 60 L. Ed. 984, the Court at page 253 stated as follows:

“The next item of the plaintiff’s business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. . . .”

The persons using the service may be few in number (*Camp Rincon Resort Company v. Eshleman* (1916), 172 Cal. 561, 185 P. 186). Indeed, the fact that only one person uses the service rendered does not control the question. In *Ford Hydro-Electric Company v. Town of Aurora* (1932), 240 N.W. 418, 206 Wis. 316, the Court stated as follows at page 420:

“It is next contended that the mere fact that a plant has only one customer or a few customers does not prevent it from being a public utility, provided the plant is built and operated for furnishing power to the public generally. To this proposition *Cawker v. Meyer*, 147 Wis. 320, 133 N. W. 157, 158, 37 L. R. A. (N. S.) 510, is cited. . . . The court says: ‘The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility.’ It is stated, however, that ‘whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the pub-

lic, as where a plant is built and operated for furnishing power to the public generally, but for a time finds one consumer who uses it all. If the product of the plant is intended for and open to the use of all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility.'

This case furnishes the test to be applied in ascertaining whether plaintiff was a public utility. The fact that it serves a single customer is not determinative. The question is whether the plant is built and operated to furnish power to the public generally. If it is, then the fact that it has presently only a single customer will not prevent it from being a public utility."

The factor, as far as the public is concerned, which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who, *from the nature of the service rendered* are in a position to require it, have the right to be supplied with the service on equal terms (*Allen v. R. R. Commission* (1918), 179 Cal. 68, 88, 175 P. 466).

TWA co-mingles so many argumentative points under specific topics that it is difficult to follow the confused reasoning employed in its endeavor to avoid the fundamental issue at bar.

Illustration of the confused reasoning employed by TWA is contained in Argument II, page 44 of its brief, we quote:

“The airport’s primary public is not a dozen airlines, but is the air-traveling public—2,500,000 air passengers in and out of San Francisco in 1952 (Tr. 374). The charges of the scheduled airlines are regulated by the Public Utilities Commission of California as to intrastate traffic and by the Federal Civil Aeronautics Board as to interstate traffic (*People v. Western Air Lines, Inc.* (1954), 42 Cal. 2d 621, 268 P. 2d 723; 49 U.S.C. 642).”

The city has heretofore shown that the operation of a utility is not measured by numbers of patrons, but rather that the utility is available to all users upon a non-discriminatory basis. One patron or many may be entitled to the right to be serviced by the utility.

TWA’s assertion that the city’s primary public are the 2,500,000 air passengers in and out of San Francisco is fallacious. On page 7 of TWA’s brief, TWA contradicts itself by stating that the 2,500,000 people were airline passengers. In other words, this huge number of patrons belong to the common air carriers and were to be serviced by them. TWA would have the Court believe that the city was the “utility carrier” of these 2,500,000 passengers in 1952. Then, TWA states that under *People v. Western Airlines Inc.* (1954) 42 Cal. 2d 621, 268 P. 2d 723, 49 U.S.C. 642, the power to regulate passenger fares in intrastate traffic is regulated by the Public Utilities Commission of the State of California.

At no time, throughout this proceeding, has the city stated a right to regulate fares of air passengers.

It has and does recognize the air passengers as patrons of the air carriers in international, national and intra-state traffic that the fares for such passengers are set by either the California Commission or the Civil Aeronautics Board.

The City has nothing to do with any passenger of any carrier. It does not operate or manage the airplanes, ticket counters, or baggage, issue transportation accommodations, engage or manage carrier personnel, or any feature of air transportation. On the other hand, the City owns, maintains, regulates and manages an airport for all air carriers to land and take off with passengers who have employed the carriers to transport them to a given destination. The City cannot discriminate as to the air carriers which can land and take off from its airport. The airport is open to all air carriers on a non-discriminatory basis.

C. Court Decisions Uniformly Declare Operation of Airport to Be a Public Utility Activity.

In every case in which the question has been presented, the Courts have held that a municipal airport is a public utility.

State ex. rel. City of Lincoln v. Johnson (1928),
117 Neb. 301, 220 N. W. 273, 274;

State v. Jackson (1929), 121 Ohio St. 186, 167
N. E. 396;

*Price v. Storms, et al., Board of Trustees,
Town of Okemah* (1942), 191 Okla. 410, 130
Pac. 2d 523;

Jones v. Keck (1946), 74 Ohio App. 549, 74
N. E. 2d 644, 646;

City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 54 N. E. 2d 656;

State v. Board of County Commissioners (1947), 149 Ohio St. 583, 79 N. E. 2d 698, 703.

In *State v. Jackson, supra* (an action to compel the City of Canton, Ohio, to submit to referendum an ordinance authorizing city officials to purchase land as site for airport) the Court, at page 396, stated as follows:

“Manifestly no argument is necessary to show that a landing field for aircraft is a public utility. If it were not a public utility, the Legislature would have no power to make provision for purchase and condemnation of lands for such purposes. It being a public utility, the question of the right to a referendum has already been settled by this court in *State ex rel. Diehl, Jr. v. Abele*, 119 Ohio St. 210, 162 N.E. 807, decided June 20, 1928.”

In *Jones v. Keck, supra*, the Court, at page 646, stated as follows:

“Section 3939, General Code, gives a municipal corporation the right to acquire, construct, maintain and operate airports and landing fields. Such airports and landing fields are of the character of public utilities and all laws applicable to municipally owned utilities are applicable to such airports and landing fields. *State ex rel. Chandler v. Jackson*, 121 Ohio St. 186, 167 N.E. 396.”

In *State ex rel. City of Lincoln v. Johnson, supra*, the Court, at page 274, stated as follows:

“In a sense the Home Rule Charter is the constitution of the city. It is a frame of municipal government and is intended to be more permanent in its nature than an ordinary statute. In general features, it is in a form to meet changing conditions as they arise. An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power. In this view of the questions raised by the auditor, an equipped municipal aviation field is both a ‘public service property’ and a ‘public utility’ within the meaning of the Home Rule Charter which authorizes municipal bonds upon a majority vote.”

In *City of Toledo v. Jenkins, supra*, the Court, at page 663, stated as follows:

“Section 3939, General Code, provides, *inter alia*:

‘Each municipal corporation in addition to other powers conferred by law shall have power:
* * *

‘(22) to purchase, lease or condemn land and/or air rights necessary for landing fields, either within or without the limits of a municipality, for aircraft and transportation terminals and uses associated therewith or incident thereto, * * * and to improve and equip the same with structures necessary or appropriate for such purposes.’

The statutory provisions confer upon the municipal corporation power to own or lease and

operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (State ex rel. Chandler v. Jackson, 121 Ohio St. 186, 167 N.E. 396), the Toledo Municipal Airport was and is a complete public utility unit."

In *Price v. Storms, supra* (in which Court denied injunction against sale of lands for bonds to acquire land upon which to locate a municipal airport), the Court, at page 525, stated as follows:

"In State ex rel. City of Lincoln v. Johnson, State Auditor, 117 Neb. 301, 220 N.W. 273, it is held that an equipped municipal aviation field is both a public service property and a public utility and the establishment of such a field is a governmental purpose for which bonds may be voted and taxes levied and collected. Plaintiffs cite no case from a court of last resort holding that an airport is not a public utility and we have found none. It is a matter of common knowledge that municipally owned airports are now being operated throughout our country."

II.

THE PUBLIC UTILITIES COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO IS THE RATE FIXING BODY AND ITS RATE FIXING POWER IS FULLY EQUIVALENT IN LEGAL EFFECT TO THE EXERCISE OF SUCH POWER BY ANY RATE FIXING BODY.

A. Municipality Has Power to Fix Rates for Municipally Owned Utilities.

In California a municipality has the power to fix rates and charges of municipally-owned utilities.

Durant v. City of Beverly Hills (1940), 39 Cal.

App. 2d 133, 102 Pac. 2d 759;

Jochimsen v. City of Los Angeles (1921), 54

Cal. App. 715, 202 Pac. 902;

Bowles v. City and County of San Francisco

(1946), 64 Fed. Supp. 609;

City of Pasadena v. Railroad Commission

(1920), 183 Cal. 526, 192 Pac. 25.

The Court, in *Durant v. City of Beverly Hills*, at page 137, stated as follows:

“The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to ‘establish and operate’ public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. (*City of Pasadena v. Railroad Com.*, 183 Cal. 526, 534 [192 Pac. 25, 10 A.L.R. 1425]; *Jochimsen v. Los Angeles*, 54 Cal. App. 715, 716 [202 Pac. 902].) The power of the city to furnish services to inhabitants

outside its boundaries is a part of the constitutional grant found in section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the inhabitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants."

Section 130 of the Charter of the City and County of San Francisco provides in part as follows:

"The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

Section 130 of the Charter of the City and County of San Francisco provides, then, that the Public Utilities Commission, subject to the Board of Supervisors, is empowered to establish rates and charges

for furnishing of public utilities service at the Airport, as well as the rates and charges of other utilities under its jurisdiction. Section 130 further provides that the Board of Supervisors has the duty to approve or disapprove; and, in some instances, its non-action for thirty days operates as a validation of the rates determined upon by the Commission.

No confusion should arise by reason of the coincidence that the rate-fixing body in this instance happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In the exercise of its rate-fixing power, the Public Utilities Commission of the City and County of San Francisco is acting as a public rate-fixing body even though it is at the same time engaged in a function as the operator of the utility. This was aptly said in

Connett v. City of Jerseyville (C.C.A. 7, 1940),
110 Fed. 2d 1015, 1019 (par. (5)).

“... the governing body of a municipality, when fixing utility rates or charges, is performing a public function of the municipality and acting as a rate making body as distinguished from its private function as owner and operator of the utility.”

In *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

“The present Railroad Commission was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that

its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities."

43 *Am. Jur.* 624, 625, §83, states:

"The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by the enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated, or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

McQuillin Mun. Corp., 3rd Edition, Vol. 12, p. 689:

"Otherwise stated, where the municipality owns its plant, the rates for water, light or any other product, furnished by it must be fair, reasonable and just, uniform and nondiscriminatory. The same rules enforced against public service corporations in these respects, as herein already stated, are applied with full force to the municipality."

B. No Change in Rule When Municipality Operates in Proprietary Capacity.

Stress is laid, in TWA's brief, upon the fact that the City and County in the operation of the airport acts in a proprietary as distinguished from a governmental capacity. As far as the principles of public utility law are concerned, this fact is immaterial.

Irish v. Hahn (1929), 208 Cal. 339, 281 P. 385.

In that case the Court, at page 344, stated as follows:

“It is now generally accepted that when a municipality, lawfully so empowered, undertakes to furnish, to its inhabitants who will pay therefor, the utilities and facilities of urban life, it is thereby performing a municipal and public function. (See *Pasadena v. Chamberlain*, 204 Cal. 653 [269 Pac. 630]; *In re Orosi Public Utility Dist.*, 196 Cal. 43 [235 Pac. 1004].) The fact that the function is not governmental is immaterial. It may be proprietary and still be public. The distinction between the governmental and proprietary functions was never made for the purpose of adding to or detracting from either as a public function, but for the purpose of determining the liability of the municipality in tort. (*City of Pasadena v. Railroad Commission*, 183 Cal. 526, 530 [10 A. L. R. 1425, 192 Pac. 25].)”

C. Municipality Has Extraterritorial Power to Fix Rates and Charges.

Section 19, Article XI, of the Constitution of the State of California provides:

“Section 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may pre-*

scribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. (Amendment adopted October 10, 1911.)”

See quotation from *Durant v. City of Beverly Hills* in Section A above construing Section 19, Article XI of the Constitution of the State of California.)

Further, Section 130 of the Charter of the City and County of San Francisco expressly grants to the Public Utilities Commission the right to provide for rendition of utility service outside the limits of the City and County and to prescribe rates to be charged therefor.

Further, it has been held that ordinances for the operation of an airport owned by the City in territory outside the limits of the City are valid.

Ebrite v. Crawford (1932), 215 Cal. 724, wherein the Court stated as follows at page 729:

“And it requires no great meditation to realize how strange an anomaly it would be to say that the city might own an airport adjoining its boundaries and yet be without the power to regulate the manner of its use. For other statements of the right of the city to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs see *Mulville v. City of San*

Diego, 183 Cal. 734 (192 Pac. 702); 18 Cal. Jur. 803; and Case Note to *Brown v. Cle Elum*, 55 A. L. R., pp. 1175-1186."

III.

THE LAW DOES NOT PERMIT DEPARTURE FROM SCHEDULE OF RATES AND CHARGES BY EITHER PREVIOUS OR SUBSEQUENT CONTRACT.

A. Fixation of Rates by a Legislative Body Supersedes the Terms of a Contract.

Clearly, in affording these common use facilities, the City is engaged in a public utility function. A review of principles of law governing public utilities discloses that a rate for public utility service cannot be "frozen."

A contract of this type is entirely valid, when executed, in the absence of rate regulation. But the parties must be taken to have executed such contract in contemplation of the binding effect of rate regulation thereafter.

The decisions next mentioned fully support the conclusion that, with reference to common use facilities, the general schedule applicable to all must, as a matter of law, be applied to this contract.

Pinney and Boyle Company v. Los Angeles Gas Etc. Corp. (1914), 168 Cal. 12, 18, 141 Pac. 620, Ann. Cas. 1915 D 471, L.R.A. 1915 C 282

This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby plaintiff agreed to take for the operation of its machinery, and defendant agreed to supply, electricity

for that purpose. Defendant was engaged as a public utility in the supply of gas and electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties litigant was in existence, and as the law then permitted, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The Supreme Court held that the fixation of rate thus adopted controlled over the terms of the contract. The Court ruled that a contract of such a nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was upon the ground that the parties are conclusively deemed to have contracted with that result in view. On this subject, the Court said (top of p. 18):

“A word perhaps should be added touching the asserted violation of the provision of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say that it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised.”

Numerous authorities, including those of the United States Supreme Court, are cited by the Court in support of the text just quoted.

It was argued by the plaintiff consumer in the *Los Angeles Gas Etc. Corp.* case that the legislative body undertook and had power only to fix maximum rates to be charged to the public and that, therefore, a private contract between the customer and the utility fixing a lower rate remained valid and enforceable. The Supreme Court's answer was that if such were to be the ruling, a primary purpose of rate regulation would be thwarted—the prevention of discrimination among consumers. In this connection, the Court stated (middle of p. 15):

“The untenableness of this position, however, must become apparent when a moment's consideration is given to the fact that one of the primary and most important objects to be attained by rate regulation is the prevention of discrimination. It must be quite clear that to hold that the rate-fixing power goes no farther than to name an amount beyond which a charge may not be made leaves the utmost room for abuse by way of favoritism and discrimination within that limit. It is, in practical effect, a denial of the existence of the rate-fixing power, itself.”

A holding, identical to that made in the case which has preceded, appears in

Law v. Railroad Commission (1921), 184 Cal. 737, 195 Pac. 423, 14 A.L.R. 249.

In that case, Law, a property-owner, entered into a contract for the supply of heat, power and illumination to his building. Subsequent to the contract, the Railroad Commission made an order directing that all steam-heat consumers be charged upon a schedule

of rates approved in that order. As to the effect of such order in abrogating rates previously fixed by private contract, the Supreme Court said (p. 739, bottom):

“There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company. It has been conclusively settled that the interference with private contracts by the state regulation of rates is but a legitimate effect of a valid exercise of the police power which neither impairs the obligation of a contract nor deprives of property without due process of law. (*Atlantic Coast Line Ry. Co. v. Goldsboro*, 232 U.S. 548, 558 (58 L.Ed. 721, 34 Sup. Ct. Rep. 364, see, also, *Rose’s U.S. Notes*); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372 (9 A.L.R. 1420, 63 L. Ed. 309, 39 Sup. Ct. Rep. 117); *Southern Pac. Co. v. Spring Valley Water Co.*, 173 Cal. 291 (L.R.A. 1917E, 680, 159 Pac. 865); *Limoneira Co. v. Railroad Com.*, 174 Cal. 232 (162 Pac. 1033).) It is immaterial that petitioner’s contract was entered into prior to the enactment of the present Public Utilities Act and the amendment thereto by which steam-heating service was included as a utility to be regulated. If the service contracted for was devoted to public use (*Allen v. Railroad Com.*, 179 Cal. 68 (8 A.L.R. 249, 175 Pac. 466)), the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this

power results in the practical annulment of his private contract fixing compensation for a public service. (*Producers' Transp. Co. v. Railroad Com.*, 251 U.S. 228 (64 L.Ed. 239, 40 Sup. Ct. Rep. 131).)''

In *Market St. Ry. Co. v. Pacific Gas & Electric Co.* (Dist. Ct. N.D. Cal., 1925), 6 Fed. (2d) 633 (Appeal dismissed, 271 U.S. 691, 70 L.Ed. 1154), both utilities had expressed their willingness to abide by the terms of a contract for the supply of electrical energy. The Pacific Gas & Electric Company had applied to the Commission, then known as the Railroad Commission of California, for an increase in rates but excluded from its petition any increase with this particular consumer. The Railroad Commission, of its own initiative, provided that Market Street Railway Company should pay the increased rate which the Commission granted. Judge Kerrigan, in upholding this order of the Commission, ruled (p. 635, middle of column 2):

“The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered partially or wholly invalid.” (Citing authorities.)

There are many further California authorities in accord.

Sutter Butte Canal Co. v. Railroad Commission (1927), 202 Cal. 179, 259 P. 937 (Affirmed (1929) in United States Supreme Court), 279 U.S. 125, 73 L. Ed. 637;

Annotation: 74 L. Ed. at p. 305 (bottom) (Citing additional California cases.);

Annotation: 9 A.L.R. 1423.

Decisions of the Supreme Court of the United States are in accord.

Midland Realty Co. v. Kansas City Power and Light Co., 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345. (Rehearing denied at 300 U. S. 687.) 81 L. Ed. 888, 57 S. Ct. 504;

Union Drygoods Co. v. Georgia Public Service Corp., 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420.

In an *Annotation* in 74 L. Ed. 234, the California and Federal cases on this subject, as well as the cases in other states, are exhaustively reviewed. The numerous authorities therein presented confirm the conclusions: (1) that public regulation of utility rate is a function within the police power; (2) that exercise of the police power, in future action, cannot be contracted away; (3) that every contract purporting to fix a rate between utility and customer must be taken to contemplate future exercise of the rate-fixing power; (4) that, consequently, every such contract is subject to exercise, thereafter, of the rate-fixing power.

B. Cases Relied on in Appellant's Brief to Negative This Principle of Public Utility Law Not Applicable.

TWA relies upon the decision in *St. Cloud Public Service Company v. St. Cloud* (1924), 265 U. S. 352, to support its contention that the rates and charges established by the Public Utilities Commission of the City and County of San Francisco for common use facilities at the airport are invalid insofar as TWA is concerned.

The *St. Cloud* case is cited by TWA as authority for the position that the City has either the power to regulate or contract concerning rates and charges for public service. The circumstances of the *St. Cloud* case do not apply here and the principle of public utility law that rates and charges supersede contract provisions should control.

It is true that in the *St. Cloud* case, the Supreme Court of the United States held that, under the circumstances of that case, a contract of the City of St. Cloud with the St. Cloud Public Service Company fixing the rate for sale of fuel gas to inhabitants of St. Cloud was valid and the company was prohibited from petitioning for an increase in the rate.

The Supreme Court construed provisions of Section 4 of the St. Cloud Municipal Charter which provides, in part, as follows:

“The common council shall have full power by ordinance: . . . to provide for and control the erection and operation of gas works (etc.); to grant the right to erect, maintain and operate such works . . .; provided, . . . that the common council shall have authority to regulate and pre-

scribe the fees and rates and charges of any and all companies hereinbefore mentioned.”

The Supreme Court stated that interpretations of the section as set forth in decisions of the Minnesota Supreme Court would control.

TWA quotes an identical portion of the decision in the *St. Cloud* case both on p. 30 and p. 35 of its brief. Immediately preceding the quotation from the case as contained in the TWA brief, the Supreme Court stated as follows (p. 359):

“It is true that, standing alone, this proviso in the absence of any state decision to the contrary, would, under the construction given similar language in *Home Teleph. Co. v. Los Angeles*, 211 U. S. 274, 53 L. Ed. 183, 29 Sup. Ct. Rep. 50, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the city to contract as to rates . . .”

The omission of these two sentences of the opinion in the TWA brief is significant. City claims that the case at bar falls within the principles set forth in *Home Telephone Co. v. Los Angeles* mentioned in the portion of the opinion above quoted.

The only reference in the TWA brief to the case of *Home Teleph. Co. v. Los Angeles* (1908), 211 U. S. 265, 53 L. Ed. 176, is on p. 37 of its brief wherein it is stated (p. 37):

“In *R.R. Comm’n v. Los Angeles R. Co.* (1929), 280 U.S. 145, 151, 153, and in *Home Telephone*

Co. v. Los Angeles (1908), 211 U. S. 265, 273, the Supreme Court stated the same rule as the *St. Cloud* case and other cases cited above, but held that under particular California statutes the city had no power to contract as to street railway rates in the one case and telephone rates in the other. In the case at bar the contracting authority of the City is clear."

The *Home Telephone* case presented a factual situation where the Telephone Company resisted the right of the City of Los Angeles to fix rates by ordinance under admitted powers contained in the Los Angeles City Charter on the ground that the City of Los Angeles had made a previous contract with the company covering the rate.

The Supreme Court of the United States upheld the powers of the City of Los Angeles to fix rates and charges by ordinance.

The Supreme Court stated as follows (p. 273):

"The surrender by contract of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required . . . "

* * * * *

(p. 274) :

“The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power ‘by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections.’ This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance ‘to fix and determine the charges.’ It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject . . .”

* * * * *

(p. 278-279) :

“All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from

the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied . . ."

In *Railroad Commission v. Los Angeles Railway Corporation* (1929), 280 U. S. 145, 74 L. Ed. 234, Los Angeles Railway Corporation brought a suit to abrogate rates fixed by its franchise with the City of Los Angeles.

The Supreme Court of the United States stated as follows (p. 151):

"The sole controversy is whether the company is bound by contract with the city to continue to serve for the fares specified in the franchises, it being conceded that the finding below respecting the inadequacy of the 5-cent fare is sustained by the evidence. Appellants contend that at all times the city had power to establish rates by agreement and that the franchise provisions constitute binding contracts that are still in force. On the other hand, the company maintains that the state never so empowered the city; and it insists that, if the power was given and any such contracts were made, they have been abrogated . . ."

* * * * *

(p. 152):

"This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. *Georgia R. & Power Co. v. Decatur*, 262 U.S. 432, 438, 67 L.Ed. 1065, 1073, 43 Sup. Ct. Rep. 613. Our attention has not been

called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the state to authorize the bargaining away of its power to tax." (Citing cases.)

* * * * *

(p. 155) :

"The appellants invoke provisions of the city charter which are printed in the margin. But it requires no discussion to show that they are not sufficient to empower the city by contract to establish rates . . . Appellants have failed to sustain their contention that the city was empowered to make such rate contracts."

Section 130 of the Charter of the City and County of San Francisco is a mandatory provision for fixing rates. No alternative power to either fix or contract concerning rates can be inferred from Sec. 130 of the Charter, or any other provision in the Charter of the City and County of San Francisco. San Francisco as well as Los Angeles is a "home rule city." Each city has a charter. A comparison of the Los Angeles Charter provisions mentioned in *Los Angeles Rail-*

road case and *Home Telephone Company* case on the right of the City to contract, and the provisions of the Charter of San Francisco in this respect are similar. The Supreme Court of the United States has held that such Charter provisions are not to be construed so as to give a municipal corporation the alternative power either to regulate rates of public utilities or make contract concerning special customers or consumers. When San Francisco has regulated charges for public utility service these charges are exclusive and embrace all consumers and customers.

Further, as pointed out in the decision of the District Court, the *St. Cloud* case involved a contract for a uniform rate to all customers served. The case between the City and TWA, the Court states, is a contract between one consumer and a public utility, not for the purpose of establishing a uniform rate to be charged all, but rather to establish a preferential position for one customer for twenty years.

TWA relies on *Femmer v. City of Juneau*, 97 Fed. 2d 694. The lease involved in that case fixed a set price for each ship that approached the wharf using the Juneau pier. Fees for dockage and wharfage were, however, fixed by schedule.

C. The Fixing of Rates Is a Legislative Act Under Police Power. The Rule of Administrative Construction Is Not Applicable.

TWA seeks to invoke the principle of administrative interpretation and thereby estop the City in the exercise of its police power from fixing and establishing rates and charges for common use facilities.

43 *Am. Jur.* 624, Sec. 83, defines the rate-making power as follows:

“The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.” (Citing cases.)

In *Mott v. Cline* (1927), 200 Cal. 434, 446, 253 P. 718, the Court said:

“ ‘The police power, being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or ir-repealable law.’ . . . It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.” (Citing cases.)

The right to legislate cannot be estopped by actions of governmental officers or agencies.

See:

McKay v. Public Utilities Commission (1939),
104 Colo. 402, 91 Pac. (2d) 965, 973;

Caminetti v. Pac. Mutual L. Ins. Co. (1943),
22 Cal. (2d) 344.

In *State v. City of Gadsden* (1927), 113 So. 6, 8, 216 Ala. 243, the Court stated as follows:

“ . . . But, dealing with the question as one involving public interest, it will be conceded that, as a general rule, laches or neglect of duty on the part of officers of government—meaning in this case as viewed from appellant’s standpoint, the failure of the municipal officers of Gadsden and Alabama City to insist that the territory in question be treated as part and parcel of the latter municipality—is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power Co. v. United States*, 243 U.S. 409, 37 S. Ct. 387, 61 L. Ed. 791; *State ex rel. Lott v. Brewer*, 64 Ala. 298. The basis of the rule as thus announced is the principle that everyone who deals with an officer or agent of the government must, at his peril, inquire into the extent of their power, and we have no doubt that principle was correctly applied in the cases just cited. It is unreservedly conceded that the state cannot, by the operation of any mere estoppel in pais, be deprived of its right to legislate. Nor can claims against the state be created by estoppel.”

In *Sanitary District of Chicago v. United States* (1925), 266 U.S. 405, 69 L. Ed. 352, the Supreme Court of the United States stated as follows:

“A state cannot estop itself by grant or contract from the exercise of its police power.”

IV.

THE TERMS OF THE TWA AGREEMENT ARE SUCH AS TO SUBJECT RATES AND CHARGES FOR COMMON USE FACILITIES TO THE GENERAL SCHEDULE OF RATES AND CHARGES IN EFFECT IN THE AIRPORT.

A. Terms of the 1942 Agreement.

As demonstrated in Sections I, II and III, agreements are subject to the general principle of public utility law that a rate for public utility service cannot be frozen by contract. This, it is submitted, is a complete answer to appellant's claims in its brief. An intention on the part of contracting parties to freeze rates is inoperative as a matter of law. However, as a second answer to the claim that rates and charges for common use facilities were frozen by the October, 1942, agreement, it is shown in this part of the brief, there was not even the intention to freeze the rates and charges for common use facilities. This is evidenced (1) by the words of the agreement itself and (2) by construction of applicable provisions of the Charter of the City and County of San Francisco as it existed in 1942.

The following items in analysis of the October 1, 1942, agreement are according to the numbered sections thereof.

1. The document describes an area of demised premises "together with improvements thereon including Hangar No. 4 on said airport and adjoining shop space." (Section 1.) It is therein specified that the rental is to be at the rate of \$2,204 per annum for Hangar No. 4, and \$1,026 per annum for adjoin-

ing shop space, payable in advance in equal monthly installments. This rental agreement is subject to adjustment at the end of each five year period.

2. Space is provided for at a minimum area on the ground floor at the present Terminal Building and the right is conferred upon the lessee to available additional space.

3. Section 3 is directly concerned in this litigation. The first paragraph reads as follows:

“Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and *on the same terms and conditions as apply to others*, of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and contractors, patrons, and invitees, which use without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):”

There follows in Section 3 an enumeration of the various rights granted to the lessee. These may be

briefly summarized in accordance with the designated numbers in the document: (1) operation of an air transportation system; (2) repairing, servicing and parking of aircraft or other equipment; (3) incidental training of personnel and testing of aircraft or other equipment; (4) landing, taking off, parking, loading and unloading, and the right to store aircraft in any hangar of lessor at the same rates charged to others; (5) right to use motor conveyances with right to designate carrier transporting its passengers; (6) right to maintain communications system in demised premises; (7) right to conduct any other operation necessary in air transportation business.

Section 3 then proceeds, in the paragraph immediately following: "For *such* rights, uses and privileges, Lessee shall pay Lessor for each schedule as hereinafter defined, the following fees: first, second and third schedules, \$150.00 per month per schedule, and for all additional schedules, \$50.00 per month per schedule." Thereafter follow certain additions to the charges based upon further schedules or additional weight beyond 25,500 pounds. These charges *are* in accordance with the Schedule of Rates and Charges adopted by Public Utilities Commission Resolution No. 4474 on June 23, 1941 (prior to the TWA lease) and thereafter approved by the Board of Supervisors. (Exh. R-1-R-4; Tr. 623).

However, these charges are *not* in accordance with the Schedule of Rates and Charges effective September 1, 1946 (Part IV) (Exh. S-1-S-4; Tr. 624), which imposes rates upon a basis per unit of dispos-

able load, or with the further Schedule of Rates and Charges effective January 1, 1951 (Part III) (Exh. E; Tr. 55) which imposes rates on the basis of maximum gross weight of plane.

Section 3 further provides that, in the event lower or more favorable charges or fees are levied against other air carriers, then the charges and fees provided for shall be accordingly reduced.

13. Section 13 provides as follows:

“Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement.”

“Common use facilities” are such facilities as are specified in Section 3 of the lease referred to above such as runways, taxiways, sewerage and waterways, floodlights, landing lights, service from the control tower, and other facilities furnished to air carrier and operators of private and industrial airplanes in general and necessary *in joint utilization* among the airlines and aircraft owners for the profitable operation of the airport.

It is to be noted that further in Section 3 the lessee is charged certain sums per number of schedules for *such rights*. It is in addition in Section 3 provided

at the inception thereof, that the lessee is "to utilize those common uses *on the same terms and conditions as apply to others.*"

The contention of TWA at the trial of this case was that the equivalence of "terms and conditions" as between the named lessee, TWA and "others", means only terms and conditions as to operations and that these words are not intended to comprehend uniformity of charges for common use facilities. In fortification of this argument TWA cited Section 13 above quoted.

However, the phrase from Section 3, italicized above—"on the same terms and conditions"—is just as effective in an imposition of charges for these facilities as if such charges were set forth in the lease in precise terms of dollars and cents. This is true because the general schedule of charges applicable to all is obviously the intended governing factor. The quoted phrase—"the same terms and conditions as apply to others"—has been consistently interpreted by the courts as inclusive of any term in the related agreement or agreements.

Words and Phrases (Perm. Ed.) Vol. 41, p. 399.

B. Charter Provisions Relating to Leases.

There is another and conclusive reason for the interpretation of the lease in such manner as not to afford, within any "rental" charge, use, without conforming to Schedule of Rates and Charges additional charge, of the aprons, runways and common use facilities.

Section 93 of the *Charter* enacts that

“... the public utilities commission may provide by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years; and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission; provided, however, that no such lease shall be made to any other public utility without the approval of the board of supervisors by two-thirds vote thereof.”

This charter section has no pertinency as far as the October 1942 lease with TWA is concerned. With the exception of the final proviso, *that portion relating to airport leases was enacted by charter amendment ratified by the Legislature in 1946*. Hence, it was not in effect at the time of the execution of the TWA lease in 1942.

There was then no special provision for the leasing of airport property in 1942. Such provision for the leasing of airport property did not enter the charter until 1946. The TWA lease, therefore, fell under the category of the first paragraph of Section 93 of the charter, which provides for the leasing of real property in instances where the land “is not required for the purposes of the department.” This part of the section restricts the period of the lease to 20 years. It is significant that TWA lease was for that length of time. The 1946 amendment to the Charter provided

for a 40-year period for airport leases. It is apparent that the TWA lease was drawn by virtue of municipal authority conferred under the first paragraph of Section 93—the only applicable provision in effect at that time. But the Charter, as it stood at that time, provided in Section 123:

“The board of supervisors shall have power to lease or sell any public utility or *any part thereof*; provided that any ordinance or *other measure* involving the lease or sale of any public utility or *part thereof*, except as provided in sections 92 and 93 of this charter . . . must be referred and submitted to a vote of the electors of the city and county at the election next ensuing . . .”
(Emphasis ours).

The TWA lease was not submitted to the electors. Sections 92 and 93 deal respectively with sales and leases. Section 93 (in paragraph 1) deals alone with property *not required* for the purposes of the department. Obviously, the various common use facilities, such as aprons, runways and the like *are* required for the purposes of the department.

TWA, in effect, argues that, *by virtue of the terms of its lease*, it is entitled to the right to common use facilities *under the rental charge* included as a term of the lease. In other words, the contention is that it has *leased* this right.

If the foregoing offered construction were adopted, it would render void the TWA lease, inasmuch as there was no submission to the voters.

On the other hand, if the conception is taken that TWA has leased land and space only with obligation

to pay for public utility services in common use at regularly established rates for all, then it is to be concluded that the TWA lease is valid.

V.

CLAIM OF TWA THAT CITY IS NOT CONDUCTING A "MUNICIPAL AFFAIR" IN THE OPERATION OF A MUNICIPAL AIRPORT IS NOT TRUE.

TWA, in its brief (pp. 20, 25), advances the argument that the City had the right to contract relative to rates and charges for common use facilities under the provisions of California Municipal and County Airport Law (Cal. Stats., Chapt. 267, p. 485) because the operation of the airport is not a municipal affair and therefore, if there is inconsistency between the State statute and Charter provisions, the State statute controls.

The fundamental principle is correct. Where a municipality avails itself of the provisions of Article XI, Sections 6 and 8 of the California Constitution and becomes a chartered city (as San Francisco did by adopting a charter in effect January 8, 1932), its power over municipal affairs becomes all-embracing, restricted and limited by the charter only, and free from any interference of the State through general laws. The city becomes independent of general law upon municipal affairs.

West Coast Advertising Co. v. San Francisco (1939), 14 Cal. 2d 516, 95 P. 2d 138;

Kennedy v. Ross (1946), 28 Cal. 2d 569, 170 P. 2d 904.

The fallacy in the TWA position is the statement that the City and County of San Francisco does not own and operate the airport as a "municipal affair." No cases are cited by TWA to substantiate this claim. *Ex parte Houston* (1950), 193 Okla. Crim. 26, 224 P. 2d 281 (p. 25, Appellant's Brief) is the only case cited by TWA relating to a municipal airport. The decision in this case is contrary to the contention of TWA.

Commencing with the leading case, *Hesse v. Rath*, 19 N.Y. 436, 164 N.E. 342, it has universally been held by the courts that a city which owns and operates an airport performs this function as a matter of local concern and is governed by the law applicable to matters which concern the municipality exclusively as a "local concern" or "municipal affair."³

In *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. 2d 611, the operation and maintenance of an airport by the City was directly raised. The State Supreme Court stated at page 614:

"The conduct and maintenance of an airport by a municipality is a public enterprise, not 'purely

³See *Ebrite v. Crawford*, 215 Cal. 724, where the Court stated: "Municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." See also *City of Wichita v. Clapp*, 125 Kan. 100, 263 P. 12; *Dysart v. St. Louis*, 2 Mo. 514, 11 S. W. 2d 1045; *City of Ardmore v. Excise Board* (1932), 155 Okla. 126, 8 P. 2d 2; *State v. Clausen* (1930), 157 Wash. 457, 289 P. 61; and *City and County of Denver v. Board of Commissioners, Etc.* (1945), 113 Colo. 150, 156 P. 2d 101, wherein the Court stated at page 103: "The fact that the General Assembly is authorized cities and towns generally to construct, operate and maintain airports within five miles of their boundaries makes their construction, operation and maintenance within such limits a municipal purpose."

commercial or industrial'. No better statement of this proposition has been called to our attention than is found in the discussion of the subject by Mr. Justice Cardozo in *Hesse v. Rath*, 242 N. Y. 436 [164 N. E. 342]. Because of the advance in the science of aviation, and the universally recognized need of making provision for navigation of the air, a quotation from the opinion is here appropriate: 'A city acts for city purposes when it builds a dock or a bridge or a street or a subway. (*Sun Printing & Pub. Assn. v. New York*, 152 N. Y. 257 [46 N. E. 499, 3 L. R. A. 788].) Its purpose is not different when it builds an airport. (*Wichita v. Clapp*, 125 Kan. 100 [263 Pac. 12, 63 A. L. R. 478].) Aviation is today an established method of transportation. The future—even the near future—will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition.' "

It necessarily follows, therefore, that the San Francisco International Airport is governed by the provisions of the Charter of the City heretofore cited. These provisions are exclusive and the case must be decided according to Charter law and not general State law on any related subject matter.

VI.

PROPER NOTICE OF HEARING TO ESTABLISH A RATE SCHEDULE WAS GIVEN ACCORDING TO LAW.

Section 130 of the City Charter provides in part as follows:

“Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges.”

Prior to enactment by the Public Utilities Commission of the schedules of rates and charges here involved, notice of intention so to do was in each instance duly published in the official newspaper of the City and County of San Francisco. A public hearing was held in accordance with the published notice. After the hearing the Public Utilities Commission adopted schedules of rates and charges. The schedules were thereafter submitted to the Board of Supervisors and duly approved by that body at its regular meeting. This procedure was followed in connection with the 1951 schedule of rates and charges. TWA does not dispute this statement (Appellant's Brief, p. 12) (See Exhibits T-1-T-4, Tr. 22).

The 1942 agreement called for the leasing of specified real property for twenty years. “The use in common with others” of the “common use facilities” as set forth in Section 3 were continuously subject to regulation under Section 130 of the Charter.

The following decisions hold that in the absence of a charter provision no notice was required. It

must be admitted, however, that the City did give notice of hearings to change the schedule of rates and charges in accordance with Section 130 of the Charter. The City has fulfilled the requirements of law in revising the rates and charges for common use facilities at the airport.

In *Eagle-Pitcher Lead Co. et al. v. Henryetta Gas Co.* (1925), 112 Okla. 65, 239 Pac. 890, one of the contentions raised was that the commission was without authority to make the order, raising the rates from 4¢ per thousand to approximately 7¢ per thousand, for the reasons that the Okmulgee Producing and Refining Company was not a party to the proceeding and was given no formal notice of the same; and, that said refining company was a necessary party for the reason that the increase in gas rates fixed by the commission resulted in the abrogation of certain contracts binding on the refining company.

The Court answering the above question said *as to notice* on page 893:

“Under the procedure adopted and followed by the Corporation Commission in the trial of such causes, no specific form of formal pleadings are required. The one thing essential to give jurisdiction is notice, and no specific form of notice in such proceedings are necessarily essential. . . . That proceedings of this character are legislative in their nature, as well as judicial and that the rule governing the procedure in courts of law are not necessarily applicable or applied with such strictness as they are in lawsuits.

“In the case of *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150, the

Supreme Court of the United States, when considering a provision of the constitution of Virginia, which created the corporation commission of that state, and defines its power and duties, said: 'The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.' "

The California Supreme Court in the case of *San Diego Water Co. v. San Diego* (1897), 118 Cal. 556, 65, 566, *on the question of notice* lays down the following rule:

"On the other hand, the plaintiff contends that section 1 of article XIV of the constitution of this state is opposed to the constitution of the United States, in that it operates to deprive the water company of its property without due process of law. It is argued that no provision for the fixing of water rates by the tribunal thereby created can be valid without notice to those whose rights are to be affected, and an opportunity to them to appear and defend, the right to which must be given by the constitution itself. That no such notice or hearing is provided for must be admitted; but the consequence contended for does not follow.

"But we think that the true construction of that section is such that it is not open to the constitutional objection urged, even if raised by one who at the time of its adoption was engaged in that business. It obviously was not the intention of the framers of that provision to make any distinction between rights then existing and those to be thereafter acquired, nor can we attribute to them any intention of confiscating private property. The meaning of the section is,

that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonably and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere."

The Supreme Court of the United States in *Home Telephone & Telegraph Co. v. Los Angeles* (1908), 211 U.S. 265, 53 L. Ed. 176, 29 S. Ct. 50, states as to notice:

"The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the 14th Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner v. Denver*, 210 U.S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 708), would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by §31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of

charges, and that, if charges were fixed in that manner, the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633. Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the states, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case. An ordinance of the city provided that the rates should be fixed at a regular and special meeting of the city council held during the month of February of each year, and another ordinance, as has been shown, required the telephone company to render annually, in the month of February, to the city council, a statement of its receipts, expenditures, and property employed in the business,—facts which would be material on the question of fixing reasonable rates. This shows that a sufficient notice and hearing were afforded to the appellant, if it had chosen to avail itself of them, instead of declining to furnish all information, as it did. If notice and an opportunity to be heard were indispensable, which we do not decide, it is

enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case. So, it was held in *Paulsen v. Portland*, 149 U.S. 30, 38, 37 L.Ed. 637, 640, 13 Sup. Ct. Rep. 750, and it was held in *San Diego Land & Town Co. v. National City*, 174 U.S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804 that the kind of notice and hearing (in that case provided by statute) which the ordinance in this case afforded was sufficient. For these reasons the contention of the appellant on this part of the case is denied."

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Dated, San Francisco, California,

April 29, 1955.

Respectfully submitted,

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(Appendix Follows.)

Appendix.



Appendix

*In the United States District Court
For the Northern District of California,
Southern Division*

Civil No. 30,326

Trans World Airlines, Inc., formerly
known as Transcontinental & West-
ern Air, Inc., a Delaware corporation,
Plaintiff and Cross-Defendant,

vs.

City and County of San Francisco, a
California municipal corporation, et
al.,
Defendants and Cross-Complainants.

ROCHE, District Judge: Plaintiff is a corporation which in the course of its business utilizes land and facilities so that its airplanes may land, take off, and be serviced and stored.

Defendant, represented by its Public Utilities Commission, business operator of the San Francisco Airport, in 1942 entered into a 20 year lease agreement with the plaintiff to furnish the land and facilities so used.

Twice during the life of this lease between the parties litigant, the Public Utilities Commission of the City regulated and prescribed rates which plaintiff and the other airlines were to pay for using the airport.

The rates prescribed by the Public Utilities Commission were higher than the rates fixed by the lease of plaintiff and defendant. Plaintiff refused, and still refuses to pay these higher rates, insisting that the limits of its liability are the charges fixed by the lease. Defendant has advised plaintiff that it must pay under the schedule of rates and charges, and that in default of such payments the airline will be deprived of certain facilities at the airport. This action for declaratory relief followed.

The City contends that the rates in the schedules are enforceable only as they apply to landings, take-offs, and other common use facilities; as to those properties not used in common it is admitted that the lease controls. The questions advanced may be summarized as follows:

(1) Does the furnishing of common use facilities at the airport to the airlines constitute a public utility service?

(2) Does the Public Utilities Commission of the City have rate-making jurisdiction over the airport?

(3) Does the law allow a public utility to depart from the regular schedule of rates and charges by contract?

(4) Does the doctrine of commercial frustration apply to the facts of this case?

1. Public Utility Function.

In the total design of the airport "common use facilities" are installed which are available in the operation of all aircraft. These are the runways, where planes land and take off; the landing aprons or ramps where passengers and cargo are taken on and discharged; the taxi-ways which connect the runways with the loading aprons or ramps; and other conveniences and facilities such as lights, signals, beacons, control tower, etc., shared by all airline companies utilizing the airport. The defendant maintains that the utilization of the enumerated areas and facilities involves the provision of a public utility service to the airlines as customers of this service.

Plaintiff counters with the proposition that the public to be served by the airport is the general public which uses it; that these people, and not the airlines, are the true customers of the airport's facilities. To support its argument plaintiff points out that 3,250,000 members of the general public used the airport last year, but that only 12 airlines are parties to the contracts entered into for facilities. However, the fact that only relatively few airlines use the service does not control the question. The number using the service may be few in number. *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, 158 Pac. 186. Indeed, the fact that only one customer uses the services rendered does not control

the question. *Ford Hydro-Electric Co. v. Town of Aurora* (1932) 240 N. W. 418, 206 Wis. 316.

What does control then? The factor which as far as the public is concerned which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who from the nature of the service rendered are in a position to require it, have a right to be supplied the service on equal terms. *Allen v. R. R. Commission* (1918) 179 Cal. 68, 175 Pac. 466. The limitations of place, requirements, ability to pay and other facts determine the customers that will use a particular service. *Terminal Taxicab Co. v. Kuntz* (1916) 241 U. S. 252, 60 L. Ed. 984.

Plaintiff cites the cases of *Marin Water Co. v. Town of Sausalito* (1914) 168 Cal. 587, 143 Pac. 767, and *Del Mar Water Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, as instances where the court found that the contracting parties were not in a relationship of public utility and customer. In the *Marin Water* case a water company contracted to supply a municipality with a bulk supply of water for 10 years. The municipality in turn sold the water to its inhabitants. The question raised was whether the water company was functioning as a public utility in supplying the City with water under this contract. This case is inapplicable as it involves a sale in bulk of a commodity from one utility to another. In the instant case there is a continuing service rendered by one utility to another, this latter utility being a member of the general public served.

The Del Mar case is also distinguishable. The court found in this case that the utility had not offered its water to the general public. The sale of water to the 17 inhabitants of the town of Del Mar was on a per barrel basis. It was like the private sale of water by a farmer having a well in his backyard. This case is limited to cases presenting similar facts.

The public function of a municipal airport is recognized in many cases, *State ex rel. City of Lincoln v. Johnson* (1928) 117 Neb. 301, 220 N. W. 273; *State v. Jackson* (1929) 121 Ohio St. 186, 167 N. E. 396; *Price v. Storms, et al., Board of Trustees, Town of Okewah* (1942) 191 Okla. 410, 130 Pac. (2d) 523; *Jones v. Keck* (1946) 74 Ohio App. 549, 74 N. E. (2d) 644; *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N. E. (2d) 656; *State v. Board of County Commissioners* (1947) 149 Ohio St. 583, 79 N. E. (2d) 698. In the case of *Toledo v. Jenkins*, cited supra, the court stated, "The statutory provisions confer upon the municipal corporation power to own or lease and operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (*State ex rel. Chandler v. Jackson*, 121 Ohio St. 186, 167 N. E. 396), the Toledo Municipal Airport was and is a complete public utility."

The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is twofold. On one hand for the use of the air-traveling public, and on

the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the City as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.

2. Rate-Fixing Power of the San Francisco Public Utilities Commission Over the San Francisco Airport.

Section 121 of the charter of the City and County of San Francisco gives the Public Utilities Commission jurisdiction over the airport, and provides in part:

“The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purposes of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof.”

The rate-fixing power of the Public Utilities Commission is found in Section 130 of the charter, which provides in part:

“The commission shall have the power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdic-

tion, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

No confusion should arise by reason of the coincidence that the rate-fixing body in this case happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In entering the lease the Public Utilities Commission was acting proprietarily. In the exercise of its rate-fixing power the Commission is acting as a public rate-fixing body even though it is engaged in a function as operator of the utility. *Connett v. City of Jerseyville*, 110 Fed. (2d) 1013. In California a municipality has the power to fix rates and charges of municipally owned utilities. *Durant v. City of Beverly Hills* (1940) 39 Cal. App. (2d) 133, 102 Pac. (2d) 739; *Jochimsen v. City of Los Angeles* (1921) 54 Cal. App. 715, 202 Pac. 902; *Bowles v. City and County of San Francisco* (1946) 64 Fed. Supp. 609; *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25.

The approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the legislature. *Yosemite, etc. v. State*

Board of Equalization (1943) 59 Cal. App. (2d) 39. Under Section 130 of the charter the Public Utilities Commission is empowered to establish rates and charges for the furnishing of utility services outside the limits of the city and the rates to be charged therefor. In order for the services of an airport to be rendered outside the limits of a municipality it necessarily follows that the airport be constructed outside the boundaries of the municipality.

Plaintiff contends that the police power of the city, including its rate-fixing power ceases at its borders, and that only a proprietary power may be exercised beyond its borders. *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 319, 41 Pac. 1093; *Incorporated Town of Sibley v. Ocheydan Electric Co.* (1922) 194 Iowa 950, 187 N. W. 560; *City of Colorado Springs v. Colorado City* (1908) 42 Colo. 75, 94 Pac. 316. This is true except in those cases where the legislature has provided for the exercise of this power. The charter of the city, approved by the legislature, specifically provides for the exercise of this power, and therefor the Public Utilities Commission has jurisdiction to set the rates and charges for the common use facilities at the airport.

3. Departure From the Prescribed Rates by Contract.

It is this court's decision that in affording the common use facilities at the airport to the airlines that the City is engaged in a public utility function. Plaintiff contends that, notwithstanding this fact, the City

can by lease agreement fix with each individual airline using the airport the charges for these facilities and services for a definite term.

Plaintiff cites two Supreme Court cases, *Home Telephone Co. v. Los Angeles* (1908) 211 U. S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U. S. 352, as instances where a public utility was held to have entered into a binding contract for the furnishing of a utility service at a fixed charge. Both cases are distinguishable from the instant case.

The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated. In the instant case the lease agreement constitutes nothing more than a contract between *one* consumer, and a public utility, not for the purpose of establishing a uniform rate to be charged all members of the public using the utility, but rather to establish a preferential position for this one consumer for twenty years. A contract of this type is entirely valid when executed, and is binding in the absence of rate regulation by the Public Utilities Commission acting on behalf of the public. Any intention on the part of the parties to fix charges not subject to regulation is inoperative as a matter of law. The decisions next mentioned fully support the conclusion that, with reference to the common use facilities, the general schedule applicable to all must as a matter of law, be applied to this contract.

The case of *Pinney & Boyle Co. v. Los Angeles Gas Co.* (1914) 168 Cal. 12, 141 Pac. 620, decided by the Supreme Court of this state is in point. This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby the plaintiff agreed to take for operation of its machinery, and defendant to supply electricity for that purpose. Defendant was engaged as a public utility in the supply of electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties was in existence, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The court held that the fixation of the rate thus adopted controlled over the terms of the contract. The court ruled that a contract of such nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was on the ground that the parties are deemed to have contracted with that result in view. A holding, identical to that made in the case which has preceded appears in *Law v. Railroad Commission*, (1921) 184 Cal. 737, 195 Pac. 423.

Various other decisions of the Supreme Court of California are in accord. *Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 106 Pac. 404; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033.

Decisions of the Supreme Court of the United States are in accord. *Midland Realty Co. v. Kansas City Power and Light Co.*, 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Union Drygoods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420. See also, Annotation 74 L. Ed. 234 reviewing both the California and Federal cases on this subject.

Plaintiff contends that it would be unfair for this court to declare the lease inoperative, and to hold it subject to the prescribed rates and regulations of the Public Utilities Commission. The reason put forth is that plaintiff would not have entered into a lease of hangar space without having fixed with the City in advance the charges as to the common use facilities. This argument is without merit. If it were not a manufacturer might well argue that he would not have leased a factory for 20 years except for the fact that he was able to fix by contract the price of his electricity and water for the same period. Clearly if a contract had been entered into for these utility services at a fixed rate, subsequent regulation by the proper body, would affect the charges agreed upon.

The fact that the City is both the lessor of hangar space and the provider of the common use facilities does not change the holding in this case. The hangars are constructed and leased so that the customers of the City at the airport (the airlines) can better avail themselves of the common facilities offered. This in no way affects the holding that the airport, as far as the common use facilities are concerned, is offering

a public utility service, the rates for which can be set by the Public Utilities Commission of San Francisco.

4. Commercial Frustration as a Defense.

The City as a distinct and separate defense contends that the "doctrine of commercial frustration" should apply in this case, thus enabling the City to avoid the lease agreement with plaintiff.

It is evident from the testimony and documentary evidence presented in this case that this defense is without merit.

In accordance with the foregoing it is Ordered

1. That Trans World Airlines, Inc., account to the defendants and cross-complainants in this action as to the extent of its operations to and from San Francisco Airport from and after December 31, 1950.

2. That judgment be entered herein in favor of defendants, on findings of fact and conclusions of law, and that the injunction pendente lite be denied.

3. That judgment in favor of cross-complainants be entered herein in an amount to be determined. Counsel is directed to prepare findings of fact and conclusions of law in conformance with the opinion. Each party to pay its own costs.

No. 14,523

United States Court of Appeals
For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,

Appellees.

APPELLANT'S REPLY BRIEF.

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vs.

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Appellees.

APPELLANT'S REPLY BRIEF.

The City's brief submits a number of separate propositions, but all are directed to one or the other of two conclusions, (1) that the agreement in suit is ineffective *as a matter of law*¹ because the City is legally obliged to fix its charges to the airlines for common use facilities at the airport as public utility rates, and (2) that *as a matter of contract* the TWA agreement incorporates whatever rate schedules the municipal Public Utilities Commission may from time to time adopt.

The City asserts the foregoing conclusions in the face of the authorities cited in appellant's opening brief, which

¹All emphasis in this brief is ours unless otherwise noted.

demonstrate their invalidity. Therefore, before answering the separate arguments made by the City, we wish briefly to review controlling principles set forth in our opening brief which the City either ignores or inadequately tries to explain away.

I.

THE CITY'S BRIEF DOES NOT MEET THE POINTS FOR REVERSAL MADE IN APPELLANT'S OPENING BRIEF.

The City's arguments except for the one point involving the contract language (answered *infra* 14-17) start always from the assumption that the City is operating a public utility, which it sometimes describes as "the airport" and sometimes as "the common use facilities at the airport" (e.g., City's Brief, pp. 3, 7). This assumption of a public utility relationship between the City and the airlines if justified (which we do not concede) would be irrelevant. *If the City had statutory authority to make the contract in suit, the contract is binding whether the case involves a public utility relationship or not.* The question in this case is not whether the airport is a public utility, but whether the City had lawful authority to make the contract.

The City does not, and under the statutory language could not, deny that the state statute, the Municipal and County Airport Law (quoted in the appendix to Appellant's Opening Brief) expressly grants authority to lease and contract as to airport lands, building space *and facilities*. The City, however, claims that this statute is inapplicable because the case concerns a "municipal affair."

If this were true, the contract would still be valid, because the charter and the home-rule powers of the City would, if material, give contracting authority (Appellant's Opening Brief, pp. 25-31). Still further, the contracting power is implicit in the City's authority to operate the airport, for which proposition the decision of this court in *Femmer v. City of Juneau* (1938) 97 F.2d 649, 652, is directly in point. *The contract is, therefore, valid whether the case involves a public utility or not, or involves a "municipal affair" or not.*

Actually, the case does not involve a municipal affair, and since the City rests its denial of the contracting power wholly on the municipal affair point, its case falls with its first premise, regardless of other controlling points for reversal made in appellant's opening brief. "Municipal affair," in the sense material to the case at bar, is a technical term, marking the line under the California Constitution between matters governed by general state statute and matters controlled by municipal charters. Regulation, under governmental powers of matters affecting state-wide, national and international carriers by air is certainly not a "municipal affair." This is clear, we submit, from cases cited in TWA's opening brief (p. 25), of which the City's brief offers no distinction. Since the TWA brief was filed the Supreme Court of California has reinforced the authority of these cases by its decision in *Pac. Tel. & Tel. Co. v. City of Los Angeles* (Apr. 15, 1955) 44 A.C. 299, 307, 282 P.2d 36 (quoted *infra* 6-7).

Since the City had contracting power and exercised that power in making the TWA contract, it is bound

by the contract, regardless of whether it had or has regulatory power also. This follows from the decision of this Court in the *Femmer* case sustaining a contract for use of a wharf, a municipally-owned facility, and pointing out the distinction between this type of contract and contracts which may be voidable by regulatory power (97 F.2d 654, quoted Appellant's Opening Brief, pp. 39-40). The same result follows from *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and similar cases (Appellant's Opening Brief, pp. 33-37). The City distinguishes the *St. Cloud* case by claiming that the San Francisco charter gives the City no power to contract (Brief for Appellees, pp. 30-36). Since contracting power exists both by express provision of state statute regarding airport facilities, and because, under the *Femmer* case, such power is implicit in the City's statutory power to operate the airport (97 F.2d 652), the distinction fails, and the validity of the 1942 contract is established without regard to the contracting powers to be found in the charter and in principles of municipal home rule, if material (Appellant's Opening Brief, pp. 26-31).

In our opening brief we stated the foregoing and other separate and independent reasons why the decision of the District Court cannot be supported. The City, nevertheless, adopts the decision below without reservation as part of its brief to this court (Brief, p. 7), but does so without answering the decisive considerations for reversal. Without repeating all arguments made in the opening brief, we again point out:

The District Court did not mention the contracting authority granted by state law.

The court undertook to distinguish *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, and similar decisions of the Supreme Court, on grounds contrary to rulings of this Court in *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654 (Appellant's Opening Brief, pp. 38-41).

The court held the 1942 agreement partially *superseded* by the 1951 rate schedule, but did not mention the exception therein, "Except as otherwise provided, or amended by agreement" (Appellant's Opening Brief, pp. 12-13, 53-57).

While holding that the contract was "entirely valid when executed" (Tr. 176) the court held the contract partially superseded by rate regulation. It so decided in disregard and without mention of the cases holding that the court has no jurisdiction to hold even a voidable contract *superseded*, in the absence of a *prior and express* administrative finding that the contract is unreasonable and against public interest (authorities, *infra* 19-22, and Appellant's Opening Brief, pp. 54-57).

The City adequately answers none of the above considerations; several are passed without mention. Point after point in TWA's brief, including the unconstitutionality of the City's attempted action, is passed in the same way.

In the following pages are answered the points made in the City's brief, none of which, we submit, meet the case made in TWA's opening brief, or afford any support for the judgment appealed from.

II.

**REGULATION OF THE USE OF COMMON FACILITIES AT THE
SAN FRANCISCO INTERNATIONAL AIRPORT BY STATE-
WIDE, NATIONAL AND INTERNATIONAL AIRLINES IS NOT
A "MUNICIPAL AFFAIR."**

At page 25 of its opening brief TWA cited cases dealing with the Union Depot in Los Angeles, with operation of busses on the Venice freeway, and of carlines serving both city and outlying areas. Each case held that a municipal affair was not involved.

On April 15, 1955, after our former brief was filed, the Supreme Court of California decided another case to the same point, *Pac. Tel. & Tel. Co. v. City of Los Angeles*, 44 A.C. 299, 282 P.2d 36. This case involved several questions, but the matter specially material to the case at bar can be simply indicated. The City of Los Angeles claimed that its power over municipal affairs entitled it to determine whether a telephone company could engage in the telephone business within the territorial limits of that city. The Supreme Court of California, in overruling this contention, said (44 A.C. 307):

"The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern. (See *Oro Elec. Corp. v. Railroad Com.*, 169 Cal. 466, 475-476 [147 P. 118]; *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 250-251 [135 P. 971]; *City of San Diego v. Southern Calif. Tel. Co.*, 92 Cal.App.2d 793, 800-801 [208 P.2d 27]; *People ex rel. Public Utilities Com. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167 [243 P.2d 397, 401].) Therefore, any delegation from the state to the city of authority to control the right of Pacific to do a telephone business should be clearly expressed, and any

doubt as to whether there has been such a delegation must be resolved in favor of the state. (See *Bay Cities Transit Co. v. Los Angeles*, 16 Cal.2d 772, 777 [108 P.2d 435]; *Oro Elec. Corp. v. Railroad Com.*, 169 Cal. 466, 477 [147 P. 118]; *City of Salinas v. Pacific Tel. & Tel. Co.*, 72 Cal.App.2d 494, 498-499 [164 P.2d 905].) We are unable to find any constitutional or statutory provision conferring this authority on the city."

The City offers no distinction of any of the cases cited by TWA on the municipal affair point, though the parallel with the present case is clear. The supplying of telephone service or the regulation of intercity transportation, bus operation on freeways, or grade crossings necessary to the operation of a union depot, are, by decision, not municipal affairs. Certainly then it is not a municipal affair to operate an international airport or to fix public utility rates for the use of necessary facilities by statewide, interstate and international airlines. Such activities are of the utmost importance both to the nation and the state, and by their nature cannot be municipal affairs.

In 1938 Congress passed the Civil Aeronautics Act under which the Civil Aeronautics Board exercises a broad national authority over aviation (52 Stat. 973, 49 U.S.C. 401, et seq.). In the field of state legislation are the Municipal and County Airport Law, quoted in the appendix to appellant's opening brief, and the State Aeronautics Commission Act. This latter provides a comprehensive plan for a state-wide system of airports, including those which are municipally owned (Cal. Stats. 1947, p. 2941, now secs. 21,001-21,694 of the Public Utilities Code). It is, we submit, inconceivable that these state statutes

can be rendered ineffective as to municipal airports, to which they expressly apply, on the ground that the operation of such airports is a municipal affair. And we again point out that contracting authority decisive of the present case is expressly granted to San Francisco by the Municipal and County Airport Law.

The fact that a matter of state or national importance is also of great local importance does not make it a municipal affair.

As was said in *City of Los Angeles v. Post War etc. Bd.* (1945) 26 Cal.2d 101, 114, 156 P.2d 746 (p. 114):

“It is well settled * * * that where the project has a state purpose, it is immaterial that in other respects it is local in nature.”

If there is doubt about the matter it must be resolved in favor of state authority, as held in the recent *Pacific Telephone* case, *supra*. Likewise in *Ex Parte Daniels* (1920) 183 Cal. 636, 639, 192 Pac. 442, where the court held that a state statute setting speed limits for city streets controls an inconsistent ordinance passed by a city with a freeholders' charter, it said (p. 639):

“While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—

‘Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.’ ”

So far as concerns the airport, the field of safety rules for planes using the landing strips and other facilities, has been largely filled by Federal authority.² However, the principle of the *Daniels* case is clearly applicable in the case at bar and shows, as do the other authorities cited, that this case does not involve a municipal affair.

The case of *Ebrite v. Crawford* (1932) 215 Cal. 724, 12 P.2d 937, is cited by the City in support of, but is actually opposed to, its municipal affairs argument (City's Brief, p. 23). That was a tort case involving an airplane collision at the Long Beach Airport. The plaintiff charged the defendant with negligence in having violated safety regulations promulgated by the city. No question of Federal regulation was involved. The defendant denied the authority of the city to make the regulations on the ground that the accident had occurred outside the city limits. Long Beach was a chartered city (Cal.Stats. 1921, p. 2054). *The court sustained the regulation not on the ground that it involved a municipal affair, but on the ground that the City was authorized to make it by the State Municipal and County Airport Law. The Court said (p. 728):*

“This argument of appellant cannot be sustained for the reason that the city of Long Beach had extraterritorial power necessary to regulate and lay down rules governing the use of the municipally-

²Included in the broad statutory authority of the Civil Aeronautics Board is the power to prescribe air traffic rules (49 U.S.C. 551 (7)). The Board has delegated this power to the Administrator of Civil Aeronautics (14 C.F.R. 26.26), who has promulgated comprehensive rules for airport traffic; concerning, for example, the manner in which aircraft shall taxi, take off and land, and the manner in which airport signals, communications, and control towers are to be operated (14 C.F.R. 617.1-617.30).

owned airport, lying partly within and partly without the city. By act of the legislature approved April 28, 1927 (Stats. 1927, p. 485), California municipalities were authorized and empowered to purchase, lease or otherwise acquire lands for and to operate airports or flying fields and in connection therewith 'to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport'."

None of the cases cited by the City support its municipal affair point. Except for *Ebrite v. Crawford*, supra, the question in these cases was whether public money could be spent for airport purposes. Illustrative is *Hesse v. Rath* (1928) 249 N.Y. 436, 164 N.E. 342, which was cited in *Krenwinkle v. City of Los Angeles* (1935) 4 Cal. 2d 611, 614, 51 P.2d 1098. The *Krenwinkle* case holds expressly that an airport "is a public enterprise"; that it serves a public purpose and can be built with public funds. But the City here contends something entirely different—airport operation is a "municipal affair"; therefore a specific contracting authority granted by state law with respect to airport facilities is ineffective. We know of no case anywhere which even remotely supports this contention.

III.

**SECTION 19 OF ARTICLE XI OF THE STATE CONSTITUTION
GIVES THE CITY NO POWER OF UTILITY RATE REGULA-
TION MATERIAL TO THE CASE AT BAR.**

The City's contention that section 19 of Article XI of the California Constitution gives it the rate regulatory authority here claimed (City's Brief, pp. 18-24) has no validity. It was not adopted by the trial court. It involves the same fallacies as underlie other parts of the City's argument; i.e., the unwarranted assumption that a public utility relationship is involved, and a complete disregard of the fact that the assumption, if valid, would be immaterial. If section 19 of Article XI gives a municipal power of rate regulation over charges for airport facilities (which it does not do), there is nevertheless a coexisting contracting power; the City actually exercised this contracting power in making the TWA agreement, and is therefore bound by that agreement (authorities, pp. 33-34, Appellant's Opening Brief). It is likewise immaterial whether regulatory power, if such exists, can be exercised beyond the territorial limits of the City. Whether it can or cannot, the contracting power exists also, and this power makes the contract valid.

While section 19 of Article XI is out of point for the reasons just given, it is also out of point because it has nothing to do with the airport, or attempted municipal rate regulation of its activities. The section reads as follows (*italics as in the City's brief, p. 22*):

“Section 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communica-

tion. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants or any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance.* (Amendment adopted October 10, 1911.)”

The first italicized sentence does not deal with municipally owned utilities but **with privately owned utilities**, and the part of the sentence giving municipalities the right to regulate charges of privately owned utilities has been **superseded** by the transfer of this power to the state Public Utilities Commission (Cal.Const., Art. XII, sec. 23; see also Public Utilities Act of 1915, now contained in Public Utilities Code secs. 454, 455, 726, 728, 729, 730). The second sentence italicized by the City says nothing about rate regulation.

Further, the authorization to municipalities in section 19 to establish and operate public works (from which the City claims utility rate-making authority is to be implied) is not granted generally, but as to “public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of

communication''; i.e., specifically enumerated services. In the case of *In re Orosi Public Utility Dist.* (1925) 196 Cal. 43, 235 Pac. 1004, the Supreme Court of California said with regard to the 1911 amendment to section 19 of Article XI (p. 55):

''The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities **designated by the constitution.**''

The City cannot bring the present case within the constitutional language as to ''transportation'' or ''means of communication.'' The latter term follows the specific term ''telephone service,'' and on the principle of *ejusdem generis* refers to communication similar to telephone service. As to this principle see *Fisher v. Los Angeles Pac. Co.* (1913) 21 Cal.App. 677, 680, 132 Pac. 767; *People v. McKean* (1925) 76 Cal.App. 114, 119-120, 243 Pac. 898). As to ''transportation,'' the City furnishes no transportation at the airport. Its operations there are not like a municipal water system or street railway, where the City performs the actual service to its inhabitants. To make an analogy the City would have to furnish air transportation by establishing municipal airlines.

All cases cited by the City for the proposition that municipalities have power under section 19 of Article XI to fix rates and charges of municipally owned utilities involved utility services expressly enumerated in that section, and so are not in point on matters involving the airport.³

³*Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 759, cited by the City (Brief, pp. 18-19) involved a **water**

We again submit, however, that the proper scope or construction of section 19 of Article XI is not involved in this case. Whatever it may be, the City still had the legal contracting authority which sustains the TWA contract.

IV.

THE CONTRACT DOES NOT PROVIDE THAT THE CHARGES IN SUIT ARE SUBJECT TO THE RATE SCHEDULES FROM TIME TO TIME ADOPTED BY THE CITY; TO THE CONTRARY IT SETS OUT SPECIFIC CHARGES (SUBJECT TO ESCALATION IN STATED INSTANCES) AND ESTABLISHES THESE SPECIFIC CHARGES AS A MATTER OF CONTRACT.

The City argues that the contract language incorporates by reference whatever charges for common use facilities the City may establish from time to time (City's Brief, pp. 5-6, 39-43). This argument is based upon a single clause in section 3 of the agreement saying that TWA shall have "the use" of such facilities "in common with others authorized so to do, and *on the same terms and conditions as apply to others*" (Tr. 18). This

system. In referring to "public utility systems" the court necessarily meant systems supplying services enumerated in section 19 of Article XI. Its language, if given the all-inclusive meaning claimed by the City, would simply misstate the language of the Constitution.

Jochimsen v. City of Los Angeles (1921) 54 Cal. App. 715, 202 Pac. 902, and *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25, involved rates for municipal **water** utilities clearly within section 19 of Article XI. Although *Bowles v. City and County of San Francisco* (N.D. Cal. 1946) 64 F.Supp. 609, did not discuss section 19 of Article XI, it involved the municipal street railway of San Francisco, a **transportation** service. Although *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 159 P. 2d 931, did not involve the power of the city to fix rates, it was concerned with a municipally owned **electric** utility.

language, however, clearly relates to the use of, and not charges for, the common facilities.

To begin with, the City's construction of the agreement is contrary to that made by the District Court, which held not that the charges for common use facilities are adjustable by the terms of the **contract**, but that the contract charges had been **superseded** by a public utility rate schedule, i.e., the schedule effective January 1, 1951.⁴

The meaning of the contract, read as a whole, is clear on the point under discussion. Neither in section 3 nor elsewhere does the agreement refer to rate schedules. The schedule which the Commission had adopted in 1941 (Tr. 207-209) was in effect when the agreement was made October 1, 1942, but the agreement does not mention it. Dollar and cents charges for common use facilities are set forth and are stated as a matter of contract (Tr. 20-22).

From beginning to end the parties speak in terms of contract, and nowhere in terms of rate regulation. Several provisions would be meaningless on the City's construction. Thus in section 3—the same section as that from which the City takes a clause out of context and on it founds the present point—there is a provision that

⁴See Conclusions Nos. 8, 9, 10, 11, 14, Tr. 219-220; Opinion, Tr. 168, 177; Finding No. 18, Tr. 215-216; Judgment, Tr. 225. The point is illustrated by quoting Conclusion No. 8 (Tr. 219):

“That the said schedule of rates and charges so adopted and approved supersedes rates and charges for common use facilities set forth in Section 3 of the lease and agreement of October 1, 1942, and plaintiff and cross-defendant is legally obligated to pay the rates and charges for the use of common use facilities set forth in said schedule of rates and charges, insofar as said rates and charges provide for rates for the use of common use facilities at the San Francisco Airport.”

if more favorable "charges and fees" than the contract charges are granted to others, "then the fees and charges provided for herein shall be reduced to conform" (Tr. 22). Section 3 also contains a clause giving TWA the right to store aircraft in any hangar owned by the City "at the same rates as are charged * * * to other air transport operators" (Tr. 19); a meaningless provision if *everything* was to be at the same rates charged to other operators.

Section 24 provides that if a subsidiary or affiliated company of TWA should wish to lease available premises or facilities, the City will make a lease "upon the same terms, conditions, rentals *and fees* as provided herein" (Tr. 35). Here the parties were considering *both* charges and use, and covered both subjects specifically.

The City's contention also contradicts section 13 of the agreement. The City quotes this provision (Brief, p. 42) but offers nothing to explain away its obvious meaning. The section reads (Tr. 28-29):

"Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor, directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement."

While submitting for the above reasons that the agreement clearly does not incorporate rate schedules, present or future, we submit also that if the contract language could be considered doubtful, the doubt would be dis-

pelled by practical construction. The facts were summarized in our former brief (pp. 7-13), and need not be repeated.⁵

V.

PAGE BY PAGE REPLY TO THE CITY'S BRIEF.

Pages 2 and 3. Much of the material here mentioned was offered by the City in support of its contention that the contract had been invalidated by commercial frustration (Tr. 321, 342, 548). The trial court decided this point against the City and it is not urged on this appeal (see Tr. 178 and Appellant's Opening Brief, p. 6). As noted before, the contract provides escalation in charges for aircraft exceeding 25,500 pounds weight (Tr. 21).

Page 3. Here appears the first of the City's statements "that in the operation of *the airport* it is conducting a public utility." Sometimes the public utility is described as "*the common use facilities*" (City's Brief, pp. 7, 8). Without conceding such statements in either form (Appellant's Opening Brief, pp. 50-53), we submit again that they are not material. The City had statutory authority to make the contract in suit and is bound there-

⁵Practical construction by the parties is entitled to great weight where the meaning of contract language can be considered doubtful (*Universal Sales Corp. v. Cal. Etc. Mfg. Co.* (1942) 20 Cal.2d 751, 761-762, 128 P.2d 665; *Roy v. Salisbury* (1942) 21 Cal.2d 176, 184, 130 P.2d 706. See also Appellant's Opening Brief, p. 33).

If evidence of the circumstances surrounding the execution of the contract could be considered, it is to the same effect, namely, that the clause in section 3 on which the City now relies refers to the use of the facilities and not to the charges for such use (see testimony of Henry G. Andrews, negotiator for TWA, Tr. 286, 288, 289, and of Bernard M. Doolin, Airport Manager, Tr. 308, 315).

by *regardless of whether or not there is a public utility relationship between the City and the airlines* (supra 2-4, and Appellant's Opening Brief, pp. 33-42). As to the City's statement that it must treat all users of the airport "on an equal basis," it does not do so. Only aircraft operators are subjected to rate regulation; other airport users, including those who use facilities in common, are not (Appellant's Opening Brief, pp. 12-13, 46-47, and see *infra* 19-22).

Pages 3-5. Here the City refers to the adoption of the so-called rate schedules. The 1941 schedule, as already shown, was in effect when the 1942 agreement was made between the City and TWA but not mentioned therein (supra 14-15). The 1946 schedule provided higher charges, but the City thereafter proceeded under the *contract* for four years and expressly and repeatedly reaffirmed its binding force (Appellant's Opening Brief, pp. 11-12). In 1947, and regardless of the schedule, the City made a contract of similar nature with United Air Lines (Tr. 393). In mentioning the 1951 schedule, which is claimed to supersede the contract, the City says nothing here or anywhere in its brief of the opening proviso, "Except as otherwise provided, or amended by agreement" (Tr. 55).

The City's statement that the schedules were "of rates and charges to be paid by aircraft lines *for use of common use facilities* at the San Francisco Airport" is not accurate. The schedules indiscriminately included charges for other facilities, including those which the City admits are not subjects of rate regulation (Tr. 242, 384-390, and see Appellant's Opening Brief, pp. 12, 13, 31-33).

Pages 6-7. Contrary to statements here made by the City, the TWA agreement does not give “preferential treatment” to TWA or result in “discrimination” against other airlines which do not hold similar contracts. The City did not plead discrimination and there is nothing about discrimination in the findings or decree.

The mere fact that the charges in the 1942 contract are less than those in the 1951 schedule has no legal significance. So, in *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 709 (a case cited in the City’s brief on another point) the court upheld a difference in charges between customers of a municipally owned water company, saying (p. 138):

“Lack of uniformity in the rate charges is not necessarily unlawful discrimination, and is not *prima facie* unreasonable.”

In *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, the court sustained water rates fixed by the Commission which were different as between two classes of users. The court said (p. 143):

“No design has been shown on the part of anyone to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever. Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U.S. 184 [Ann. Cas. 1915A, 315, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, see, also, Rose’s U. S. Notes]. In dealing with the rea-

sonableness of rates and permissible discrimination based upon differences of conditions, it is there said: 'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issue involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon a difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.' "

In *Barringer & Co. v. United States* (1942) 319 U.S. 1, the Supreme Court upheld differences in freight charges made by a railroad, saying (p. 7):

"It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful."

A few of the many decisions throughout the country to the same effect are given in the note.⁶

⁶*U.S. v. Wabash R. Co.* (1944) 321 U.S. 403, 411 ("Differences in conditions may justify differences in carrier rates or service"); *Texas & Pacific Ry. Co. v. U.S.* (1933) 289 U.S. 627 (Carriers' adjustment of rates to competitive conditions "does not amount to undue discrimination"); *Kiefer et al. v. City of Idaho Falls* (1930) 49 Idaho 458, 289 Pac. 81, 83 (citing *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, *supra*, and saying, "Mere difference in the rates charged various classes

The foregoing cases establish another conclusive answer to the point under consideration, namely, that the trial court would have had **no jurisdiction** to find discrimination even if the City had pleaded it. The trial court held that the contract was "valid when executed" (Tr. 176), but voidable under the City's power of utility rate regulation, and actually avoided by the 1951 schedule (Tr. 224-225). While denying that the contract is voidable, we again point out that *if it were* it would nevertheless stand unless and until the **regulatory body**—not the court—made an express finding after hearing that the agreement is unreasonable and against public interest. That such finding by the Commission cannot be implied simply from adoption of a general rate schedule is established, we submit, by authorities cited in appellant's opening brief (pp. 55-57), of which the City makes no distinction. This matter goes to the **jurisdiction** of the District Court, as decided explicitly in the cases formerly cited, and also in the cases cited above in the present brief, including *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65, which quotes *Penna. R. R. Co. v. Inter-*

of users is not sufficient to establish an unjustifiable discrimination"); *State v. Department of Public Service* (1939) 199 Wash. 24, 90 P.2d 243, 249 ("A mere difference in rates does not, of itself, constitute an unlawful discrimination"); *Illinois Cent. R. Co. v. Illinois Commerce Commission* (1935) 359 Ill. 563, 195 N.E. 32, 34 ("A mere difference in rates alone does not constitute undue discrimination"); *City of Pittsburgh v. Pennsylvania Public Utl. Com'n* (1951) 168 Pa.Super. 95, 78 Atl.2d 35; *Baltimore O.R. Co. v. Public Utility Commission* (1939) 135 Pa.Super. 20, 4 Atl. 2d 628; *Knotts v. Nollen* (1928) 206 Iowa 261, 218 N.W. 563; *Lewis v. Mayor and City Council of Cumberland* (1947) 189 Md. 58, 54 Atl.2d 319; *P. J. Ritter Co. v. Mayor of City of Bridgeton* (1946) 135 N.J.Law 22, 50 Atl. 2d 1; *Caldwell v. City of Abilene* (Tex.Civ.App. 1953) 260 S.W.2d 712, 714.

national Coal Co. (1913) 230 U.S. 184, and in *Barringer & Co. v. United States* (1942) 319 U.S. 1 (*supra* 19-20).⁷

Pages 7-8. The City's statement of the issues ignores points made in our opening brief, which, we submit, are controlling against the validity of the judgment.

Pages 8-9. The City having given as a main heading that the *common use facilities* are a public utility proceeds to support this claim with a subhead that the *airport* is a public utility. The charter provisions referred to are discussed in TWA's opening brief (pp. 46-53). We submit that they do not establish the airport as a public utility. If, however, this were debatable, there is certainly no language in the charter or elsewhere establishing that *certain airport facilities* such as landing strips, fueling equipment, lights, signals, etc., are a public utility, but that other airport facilities, including those used in common by patrons other than airlines, are not. But always beyond these considerations is the point that the contract in suit is binding under the City's lawful authority to make it, regardless of whether a public utility is here involved or not.

Pages 10-14. TWA does not contend that public utility status is determined by the number of patrons. The point

⁷While TWA was under no obligation to meet a point of discrimination not raised by the pleadings or within the jurisdiction of the court, it may be noted that TWA was a pioneer at the San Francisco airport; that the City wanted it there to assure "continued use of the airport and the service to the City" (Airport Manager, Doolin, Tr. 315); and that the contract bound TWA to the airport for the stated period. These benefits are comparable to those to the City of Juneau mentioned by this court in sustaining the contract involved in the *Femmer* case.

actually made is stated at pages 48 and 49 of the opening brief.

Pages 14-17. The cases cited by the City as holding that airports are public utilities are not in point because in most of them the questions were such that it was unimportant for the court to distinguish between "public utility" and "public enterprise" or "public purpose."

Further, the recent decision of this court in *Air Transport Associates, Inc. v. U.S.* (9 Cir. 1955) 2 CCH Aviation Law Rep., p. 17,613, shows that the status of an airport must be determined by the state law which is properly applicable. Obviously outside state cases are not authoritative in the case at bar without a showing of similarity between their constitutional and statutory provisions and those of California. The City makes no such showing. To illustrate, it cites *Price v. Storms* (1942) 191 Okl. 410, 130 P.2d 523, where the court held a city empowered to issue bonds for a municipal airport under provisions of the Oklahoma Constitution granting powers to issue such bonds for "public utilities." But "public utility" under this constitutional provision, by express decisions of the Oklahoma courts, is synonymous with "public use" (99 Pac. 928) and "utilities" include convention halls, parks, cemeteries, fire and street-cleaning departments and a collection of American history and art.⁸

State v. Board of County Com'rs (1947) 149 Ohio St. 583, 79 N.E.2d 698, cited by the City to the point that

⁸*Barnes v. Hill* (1909) 23 Okl. 207, 99 Pac. 927; *Denton v. City of Sapulpa* (1920) 78 Okl. 178, 189 Pac. 532; *Oklahoma City v. State* (1910) 28 Okl. 780, 115 Pac. 1108; *State v. Barnes* (1908) 22 Okl. 191, 97 Pac. 997; *City of Tulsa v. Williamson* (1954) 276 P.2d 209.

an airport is a public utility, is directly against the City's contention that operation of a municipal airport is a municipal affair. The court said (79 N.E.2d 702):

“Aviation is a subject of state-wide concern and in exercising powers relating thereto counties act pursuant to authority delegated by the state.”

Pages 18-21. As already shown, the City has no utility rate-making authority under section 19 of Article XI of the California Constitution (*supra* 11-14), nor under the charter provisions here cited (Appellant's Opening Brief, pp. 46-49). Again we submit, however, that the existence of rate-making authority is not material—if it exists the City's authority to contract coexists with it.

Pages 21-22. The validity of the TWA contract is not dependent upon any distinction between governmental and proprietary capacities. Even if the City has governmental power to regulate the charges in suit as public utility rates, the contract is still valid because the City had and exercised a co-existing statutory power to contract (Appellant's Opening Brief, pp. 33-38).

Pages 22-24. As already shown, neither section 19 of Article XI of the California Constitution nor section 130 of the charter gives the City the powers here claimed. It is therefore unnecessary for the court to consider how far the Constitution, charter, or other legal rules, might grant powers beyond municipal limits in cases to which they might properly apply. We submit, nevertheless, that in a correct view the extraterritorial powers of the City over the airport are proprietary and not governmental. The City's argument at this point is based on

section 19 of Article XI of the California Constitution which, for reasons already given, we submit has no bearing on the case at bar (*supra* 11-14).

Pages 24-29. The proposition, "Fixation of Rates by a Legislative Body Supersedes the Terms of a Contract" (City's Brief, p. 24) is so broadly stated as to be untrue. The whole point of the *St. Cloud*, *Femmer*, and other cases cited in TWA's opening brief (pp. 33-42) is that rate-fixing power **cannot** supersede a municipal contract which the City had statutory authority to make.

Pinney & Boyle Co. v. L. A. Gas etc. Corp. (1914) 168 Cal. 12, 141 Pac. 620, and all others but two of the cases here cited by the City were cited by the trial court and were distinguished in our opening brief (pp. 40-42). The two cases now added, namely, *Market St. Ry. Co. v. Pacific Gas & Electric Co.* (N.D.Cal. 1925) 6 F.2d 633, and *Sutter Butte Canal Co. v. Railroad Com.* (1927) 202 Cal. 179, 259 Pac. 937, are of the same character and subject to the same distinction (Appellant's Opening Brief, pp. 39-40).

Pages 30-36. The City distinguishes *Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, by saying that St. Cloud had contracting power by its charter and San Francisco no such charter power (City's Brief, pp. 30-31). But San Francisco has explicit contracting power by state statute, to which the City's brief does not refer. It has contracting power incident to its authority to manage and operate the airport (*Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649), again a matter to which the City's brief does not refer. Further, if the charter provisions or principles

of municipal home-rule were material, the City would have contracting power from that source also, as already shown (Appellant's Opening Brief, pp. 26-31).

The City next refers to *Home Telephone Co. v. Los Angeles* (1908) 211 U.S. 265. This case states the same rule as the *St. Cloud* case, i.e., that a city cannot supersede by rate regulation a contract which it had statutory authority to make. The rule was not applied because, as the court held, the City of Los Angeles under the California statutes and cases did not have statutory authority to contract over the subject matter presented. The case at bar involves on the question of contracting power two points which the *Home Telephone* case did not involve, (1) a provision of state law granting contracting authority over the exact subject matter of this suit, namely, the airport facilities, and (2) a different rule concerning the effect of charter provisions (if material). The *Home Telephone* case was decided before the 1914 amendment to the California Constitution, under which the City has complete power over a municipal affair unless the charter expressly withholds it (see authorities Appellant's Opening Brief, pp. 26-27). Therefore the *Home Telephone* case has no bearing on the contracting authority of the City in the case at bar. But the Supreme Court unequivocally states therein the proposition controlling in the case at bar—where contracting power exists (as here it does), the City is bound by its contract regardless of whether it might have proceeded by regulatory authority.

The City's next citation, *R. R. Comm'n v. Los Angeles R. Co.* (1929) 280 U.S. 145 (Brief, p. 34), is not in point; the ground of decision was that "the State never so em-

powered the city” to establish streetcar rates by contract (280 U.S. 151, 152).

The City further says, “Section 130 of the Charter of the City and County of San Francisco is a mandatory provision for fixing rates.” As shown the charter is not the controlling instrument here. Further, the Supreme Court in a case involving almost identical charter language held that a provision that the City shall have power to regulate **does not mean that the City must regulate** (*Public Service Co. v. St. Cloud* (1924) 265 U.S. 352, quoted Appellant’s Opening Brief, pp. 30-31).

The City next adopts the distinction of the *St. Cloud* case made by the trial court, a distinction contrary to *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 654 (quoted Appellant’s Opening Brief, pp. 39-46).

The City tries to distinguish the *Femmer* case on the ground that some charges, i.e., wharfage rates, were fixed by schedule. We submit that no distinction is shown because the contract which was sustained by this court provided the charges for calls at the wharf and gave the contracting steamship line priority over others in the use of the wharf (97 F.2d 651). In this regard it went beyond the contract in the case at bar which gives TWA no priority with regard to the common use facilities.

The City makes no reference to the fundamentally important ruling in the *Femmer* case that a contract for the use of a municipally owned facility is **not** subject to avoidance by regulatory power, though this point was made and stressed in the opening brief (pp. 38-41).

Pages 36-38. The City argues that TWA in invoking legal rules as to the effect of administrative construction

is trying to estop the City from its right to legislate. A glance at the quotations made by the City will show that its authorities do not support this contention; actually they do not mention administrative construction. The City's actions in so far as they bear on portions of the 1942 contract which may be of doubtful meaning are relevant as a practical construction by a party to that contract (authorities, *supra* 16-17). The City's actions bearing upon the meaning of doubtful provisions of the charter are relevant as acts of a governmental body charged with the administration of the charter (see authorities, Appellant's Opening Brief, p. 33).

Pages 39-43. As already shown the City's rate schedule is not incorporated into the TWA agreement as a matter of contract (*supra* 14-17).

Pages 43-46. This argument was not mentioned by the trial court, and involves a play on words, i.e., that the agreement is a *lease*, and therefore while valid as to hangars and shop space under section 93 of the charter, is invalid as to the facilities used in common by the airlines because under section 123 of the charter a *lease* of such facilities requires approval by vote of the people.

The argument is completely answered by the contracting authority granted the City by state statute. The Municipal and County Airport Law grants authority to operate the airport to which, under the ruling in the *Femmer* case, contracting authority is incident (97 F.2d 652). The same statute expressly grants authority both to lease and contract, and expressly as to airport facilities (see quotation, Appellant's Opening Brief, Appendix, pp. ii-vi). If, however, the charter had any rele-

vance in this matter, the City still would have no point. The 1942 agreement is a contract as well as a lease. The City so admitted in response to TWA's request for admissions in the trial court (Tr. 115). The trial court made an express finding that the parties "entered into a written contract and lease" (Tr. 201). The trial court said also that the "*contract*" was "entirely valid when executed" (Tr. 176), and the City repeats the same language in its brief (p. 24).

The authority for the agreement in suit is not dependent on section 93 of the charter. It exists by state law. If a municipal affair were involved, which is not the case, the contracting authority would exist under the comprehensive powers of San Francisco as a home-rule city (Appellant's Opening Brief, pp. 26-27).

In the *Femmer* case it was argued that the agreement between the City of Juneau and the steamship company was void because "not submitted to the electorate and approved by them." An Alaskan statute required such approval in the case of a sale, lease, exchange or other disposition of certain public property (97 F.2d 656). This court held that the agreement for use of the wharf—a municipally owned "common use facility"—was a contract rather than a "lease" within the meaning of this particular statute. The court said in part (97 F.2d 657):

"Nor do we think that the Northland agreement effected a 'sale, lease, exchange or other disposition of property' within the meaning of subsection twentieth of section 2383. Of course, no serious contention could be made that the result of the transaction was a sale or exchange of the wharf or part thereof. However, it is argued that the agreement amounted to a

lease. With this contention we do not agree. Northland was not given a right to possession of the wharf or any part thereof but merely a permission to use it for a limited purpose—a purpose entirely consistent with its intended use.”

Pages 46-48. These pages contain the City’s argument on the municipal affair point, which has been answered (*supra* 2-10).

Pages 48-54. The City here attributes to TWA an argument which TWA did not make, and then answers that argument with no reference to the point actually made. TWA raised no issue about the sufficiency of notice for the proceedings which resulted in the rate schedule of January 1, 1951. The point is that the adoption of that schedule had no possible effect on the TWA contract for two separate reasons, (1) the express exception contained in the schedule itself, and (2) the absence of any express finding by the Commission on the TWA contract (Appellant’s Opening Brief, pp. 53-57). The pertinence of the first reason is self-evident. As to the second reason, it is settled by cases directly in point and unchallenged by the City that a contract valid when made, even if voidable by regulatory authority, is not avoided until the Commission makes an *express finding* that that particular contract is unreasonable. Such finding cannot be implied from a general rate schedule such as that of January 1, 1951 (authorities, Appellant’s Opening Brief, pp. 54-57). The same cases and likewise cases cited earlier in this brief from the Supreme Court of the United States and the Supreme Court of California hold also

that, in the absence of such an administrative finding, the court **has no jurisdiction** to make an order superseding any part of the contract (supra 21-22).

CONCLUSION.

The fact that the agreement of October 1, 1942, is, as we submit, perfectly valid and binding, creates no impediment to the proper and efficient conduct of the airport. The law gives the City ample powers of management and these powers are strengthened, not hurt, by the contracting authority granted by law.

We again submit that the authority of the City to make the lease contract of October 1, 1942, is decisive of the case at bar. Since this authority exists it is immaterial whether the airport is a public utility or not; it is immaterial whether the case deals with a governmental or proprietary function; it is immaterial whether it deals with a municipal affair—though in a correct view of the case it does not involve a municipal affair and the City has no governmental authority over the subject matter of this suit.

In addition, there are the other independent and controlling points for reversal made in our opening brief and left unanswered by the City.

We submit that the judgment cannot be supported on the grounds relied on by the trial court or any of the additional grounds put forth in the City's brief, and that the judgment should be reversed with instructions to enter

a declaratory judgment sustaining the validity of the contract and its binding force for its full term.

Dated: San Francisco, California,

May 23, 1955.

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No. 14,523

United States Court of Appeals
For the Ninth Circuit

TRANS WORLD AIRLINES, INC., a corporation, vs. CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al., 	}	<i>Appellant,</i> <i>Appellees.</i>
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APPELLEES' PETITION FOR A REHEARING.

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City Attorney of the City and County of San Francisco,

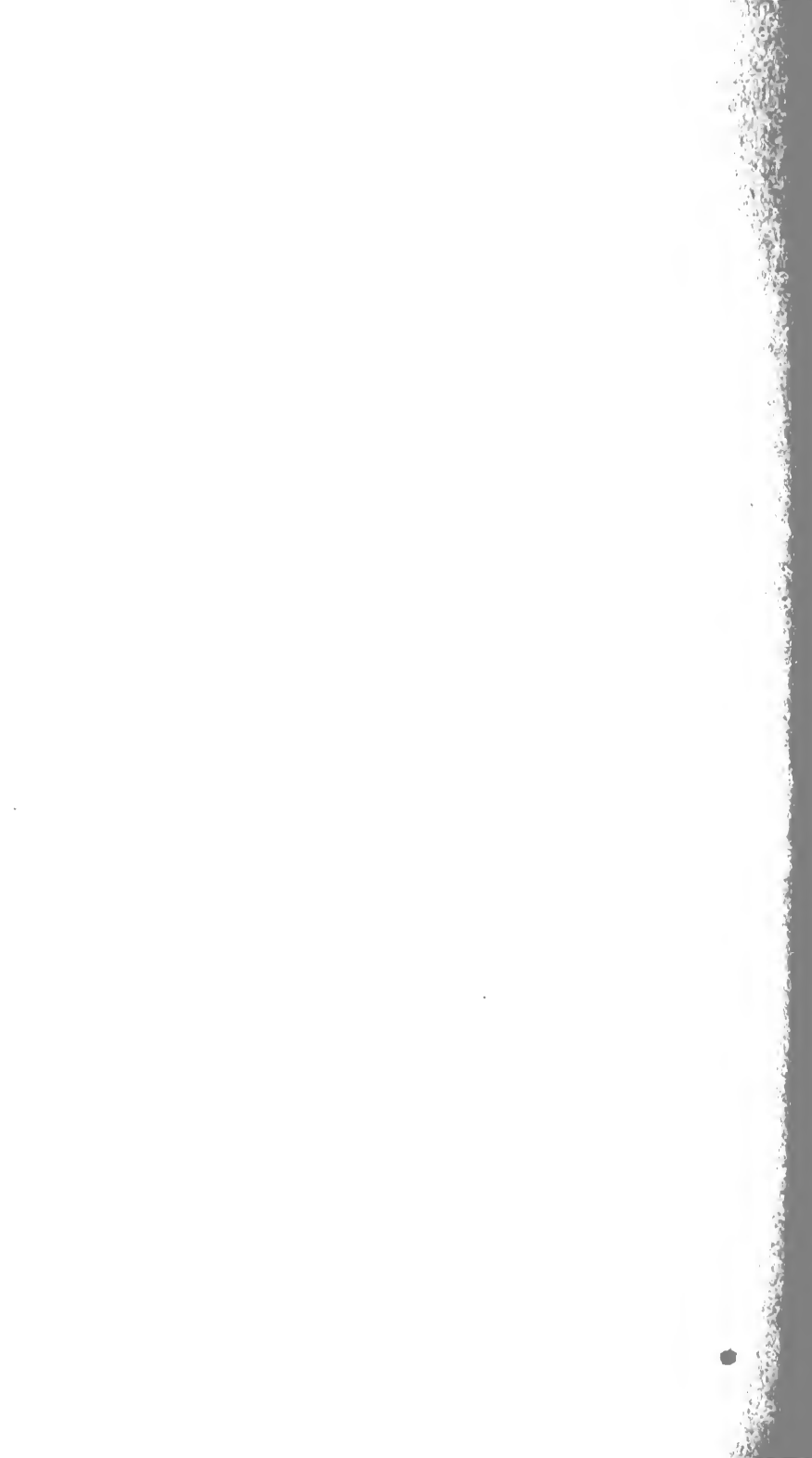
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CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

3. The Court's misinterpretation of the law, that in the operation of the airport, it is a State or Fed-

eral affair, rather than a “municipal affair” controlled and governed by the provisions of the Charter of the City and County of San Francisco, and subject to the rate making provisions of the Charter.

4. If the operation of the airport is not a municipal affair, it must be a Federal affair controlled by the Civil Aeronautics Act of 1938, as amended, then this Court is without jurisdiction.

5. If the operation of the airport is neither a municipal or Federal affair, it must be a State affair controlled by the Public Utilities Commission of the State of California then this Court is without jurisdiction.

I.

THE COURT'S FAILURE TO RULE ON THE QUESTION, THAT THE OPERATION OF THE AIRPORT, ESPECIALLY THE COMMON USE FACILITIES, IS A PUBLIC UTILITY BUSINESS.

Argument I in the City's* brief directly raised the question, “that the operation of common use facilities [at the airport] is a public utilities business”.

The Court utterly disregarded the point presented. The City deems this question of prime importance to the whole nation, namely: **IS THE OPERATION OF A MUNICIPALLY-OWNED AIRPORT PUBLIC UTILITY BUSINESS?**

TWA in its briefs and in oral argument failed to answer this question.

*For convenience, the parties will hereafter be referred to as “TWA” and “the City”. All emphasis supplied unless otherwise noted.

The City affirmatively demonstrated that the operation of a municipal airport is a public utility business.

State v. Jackson (1929), 121 Ohio St. 186, 167 N.E. 396, stated:

“Manifestly no argument is necessary to show that a landing field for aircraft is a public utility.”

In *Jones v. Keck* (1946), 74 Ohio App. 549, 74 N.E. 2d 644, 646, the Court decided:

“Such airports and landing fields are of the character of public utilities . . .”

In *State ex rel. City of Lincoln v. Johnson* (1928), 117 Neb. 301, 220 N.W. 273, 274, the Court determined as follows:

“In this view of the questions raised by the auditor, an equipped municipal aviation field is both a ‘public service property’ and a ‘public utility’ within the meaning of the Home Rule Charter . . .”

To the same effect, see *Price v. Storms, et al., Board of Trustees* (1942), 191 Okla. 410, 130 P. 2d 523; *City of Toledo v. Jenkins* (1944), 143 Ohio St. 141, 54 N.E. 2d 656; *State v. Board of County Commissioners* (1947), 149 Ohio St. 583, 79 N.E. 2d 698.

In 161 A.L.R. 734 a review of the law in all jurisdictions where the question has been presented definitely hold that the operation of an airport by a municipality or other governmental agency is within the public utility field.

This Circuit Court, in *Air Transport Association v. United States* (1955), 221 F. 2d 467, held that the United States in the operation of Elmendorf Field in Alaska was engaged in "a public enterprise".

It is submitted that the crux of the instant case is to be found in a determination of whether the City in the operation of an airport is engaged in a public utility business.

The District Court stated:

"The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is two-fold on one hand for the use of the air traveling public, and on the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the city as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.

"It is this court's decision that in affording the common use facilities at the airport to the airlines that the city is engaged in a public utility function."

Section 10001 of the Public Utilities Code of the State of California defines "public utilities" as it pertains to municipalities in these words:

" '*Public utility*' defined. 'Public utility' as used in this article, means the supply of a municipal corporation alone or together with its

inhabitants, or any portion thereof, with water, lights, heat, power, *transportation of persons or property*, means of communication, or means of promoting the public convenience.”

Section 10004 provides:

“Incidental powers included in power to acquire and operate public utility. For the purpose set forth in Sections 10002 and 10003 a municipal corporation may acquire, own, control, sell or exchange lands, easements, licenses, and rights of every nature within or without its corporate limits, and may operate a public utility within or without the corporate limits when necessary to supply the municipality, or its inhabitants or any portion thereof, with the service desired.”

Under the doctrine of *People v. Western Airlines*, 42 Cal. 2d 622, *infra*, there can be no doubt that this City in the ownership of the airport is operating a public utility.

The failure of this Court to make a ruling on this vital legal point is worthy of reconsideration.

II.

THE COURT'S FAILURE TO FIND, THAT THE CITY IN THE OPERATION OF A PUBLIC UTILITY BUSINESS (AIRPORT) CANNOT DISCRIMINATE OR GIVE A PREFERENCE BETWEEN THE VARIOUS USERS OF THE COMMON USE FACILITIES AT THE AIRPORT.

The Court's refusal to sustain the judgment of the District Court will create a chaotic condition in the

aviation industry. Twelve (12) scheduled air carriers, nonscheduled carriers and private carriers use the "common use facilities" at the San Francisco International Airport. The twelve (12) scheduled carriers fly over two million passengers a year. (Tr. p. 253.) Today there are over three million passengers a year. They are in a competitive public service, using a common terminal, the San Francisco International Airport. Two of the carriers (TWA and United Air Lines) have leases with the City which set forth rates for common use facilities based on the schedules duly enacted in 1941 and 1946. (Tr. pp. 393-394.) In their contracts there is a provision that:

"Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and *on the same terms and conditions as apply to others*, of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport . . . all of said facilities to be used and occupied in accordance with the rules and regulations of said airport." (Appellees' Brief, pp. 5-6.)

WHO ARE AUTHORIZED TO USE THE SAN FRANCISCO INTERNATIONAL AIRPORT? Section 21637, Public Utilities Code of the State of California (Stats. of 1953, Chapter 151, §1) provides:

"In no case shall the public be deprived of its rightful equal and uniform use of the airport, or navigation facilities, or portion of either."

49 USCA, Section 1110, provides:

“The airport to which the provision relates will be available for public use on fair and reasonable terms *and without unjust discrimination.*”

And in the enactment of the Civil Aeronautics Act of 1938, as amended, the Congress of the United States stated in the Declaration of Policy establishing the Civil Aeronautics Board, 49 USCA, Section 402:

“In the exercise and performance of its powers and duties under this chapter, the board shall consider the following, among other things, as being in the public interest and in accordance with the public convenience and necessity.

“(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, *without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.*”

49 USCA, Section 1101(8), defines an airport as follows:

“Public airport means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.”

49 USCA, Section 484(b), provides:

“No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person,

port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation *to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*"

Ten of the scheduled air carriers, and all non-scheduled and private carriers using the San Francisco International Airport pay according to the schedule of rates and charges for the use of the common facilities as promulgated admittedly according to law by the Public Utilities Commission of the City.

The decision of this Court would effectuate a variation of all principles of utility law by permitting City to contract with two air carriers (TWA and United) on a preference basis and to regulate the remaining ten scheduled carriers, non-scheduled and private carriers for the use of the same "common use facilities".

All twelve of the scheduled air carriers using the airport are in interstate or foreign air commerce within the meaning of the Civil Aeronautics Act of 1938, as amended. (49 USCA, Section 401 (20).)

The regulation of rates and charges for "common use facilities" at the airport must of necessity be non-discriminatory. The Supreme Court has uniformly held that there can be no discrimination or discriminatory practices or preferences indulged in by carriers in interstate commerce, whether by rail, shipping, or otherwise. In *Baltimore & O. R. Co. v.*

United States (1939), 305 U.S. 507, it was held that where interstate carrier warehouse rates were not open to all shippers alike there was a violation of the Interstate Commerce Act.

In *United States v. Baltimore & O. R. Co.* (1948), 333 U.S. 169, the Supreme Court had this to say:

“The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first act, and all amendments to it, have aimed at wiping out discriminations of all types. *New York v. United States*, 331 U. S. 284, 296, 91 L. ed. 1492 on 1507, 67 S. Ct. 1207.

“It would be strange if this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation.”

The following case is analogous to the situation at bar namely, *Union Pacific Railroad Co. v. United States* (1941), 313 U.S. 450. Kansas City, Kansas, aided by the railroad company, gave cash bonuses and rental credits to induce dealers to become tenants of a new wholesale produce terminal. The dealers were former tenants of the terminal owned by Kansas City, Missouri. The standard rental adopted was \$150 per month per unit, but for the first three months after official completion date of terminal only \$50 a month

was charged. The Supreme Court of Kansas in the case of *Kansas and State ex rel. Parker v. Kansas City*, 151 Kan. 1, 97 P. 2d 104, held the city had authority to pay sums to induce new tenants for the new terminal. The city was enjoined from such practices. The Court stated:

“In fact favoritism which destroys equality between shippers, however brought about, is not tolerated.

“In our view, action by any person to bring about discriminations in respect to transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation.

“Where, as here, the action of the city in giving cash or rental credits is, as we have decided, a part of the plan in respect to transportation resulting in an advantage to shippers, we conclude that the giving of any cash, rental, credit, free or reduced rents to induce leasing of space in the terminal is contrary to the Elkins Act.”

In *California v. United States*, 320 U.S. 577, the State of California and the City of Oakland were enjoined from giving preferential demurrage charges on the wharfs in San Francisco and in the City of Oakland. The Maritime Commission fixed a schedule of maximum free time and another schedule for avoiding discrimination to noncompensatory charges.

This Court in its decision permits the City the privilege of having twelve separate rates or charges for the common use facilities at the airport. In so doing, it does violence to all concepts of utility law

that forbids preferences or discrimination in charges for public utility services.

III.

THE COURT'S MISINTERPRETATION OF THE LAW, THAT IN THE OPERATION OF THE AIRPORT, IT IS A STATE OR FEDERAL AFFAIR, RATHER THAN A "MUNICIPAL AFFAIR" CONTROLLED AND GOVERNED BY THE PROVISIONS OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO.

The Court on page 5 of its opinion stated:

"The airport is not strictly a local affair. It is part of a global system of air transportation. Its value stems from the fact that it links the San Francisco area with other areas served by airports. It distinctly serves not only the city of San Francisco but all neighboring and outlying communities. The airport is used as a military airport. Federal and state authorities regulate charges for common carrier air traffic."

Under the provisions of Article XI, §19 of the State Constitution adopted in 1911 an airport is a "municipal affair". The first sentence of §19 of Article XI provides:

"Any municipal corporation may *establish and operate* public works for supplying its inhabitants with light, water, power, heat, *transportation*, telephone service *or other means of communication*."

An airport is a public work for supplying inhabitants of the municipality with transportation under the constitutional provision. This is made clear by the

interpretation of the State Supreme Court of the provisions of Section 20 of Article XII of the Constitution relative to the powers of the State Public Utilities Commission, also adopted in 1911, in *People v. Western Airlines*, 42 C. 2d 622.

In *People v. Western Airlines*, Western challenged the jurisdiction of the State Public Utilities Commission to establish intrastate rates for airline passengers.

One ground of objection was that Article XII, §20 of the Constitution which conferred upon the Commission power over the rates of "transportation companies" did not include airlines companies. The Court, at page 635 stated as follows:

"The fact that airline transportation companies were not in existence when the Constitution was adopted in 1879 does not make them any the less 'transportation companies' within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in *State ex rel. State Railway Com. v. Ramsey* (1949), 151 Neb. 333, at page 338 (37 N.W.2d 502): '. . . A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 24 L.Ed. 708; 11 Am.Jur., Constitutional law § 51, p. 660; 9

Am.Jur., Carriers, § 4, p. 430. These principles have been held to be applicable to transportation by air. "Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result." *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710, certiorari denied 290 U.S. 696 (54 S.Ct. 132, 78 L.Ed. 599, . . . (citations omitted)).' "

Therefore, under Article XI, §19, San Francisco was given the direct constitutional grant to establish and "operate" an airport.

The City owns its own water system, which serves San Francisco, parts of Alameda County and most of the Peninsula area. This water system links San Francisco with other areas and serves neighboring and outlying communities. That the State of California is greatly concerned with water is evidenced by a separate water code which legislates for over fifty water agencies. The use and control of water is more of a statewide affair than airports.

However, municipally owned water systems are municipal affairs under the jurisdiction of the municipality, *and not subject to State regulation*.

See:

City of Pasadena v. Railroad Commission,
183 Cal. 526, 192 Pac. 25;

Jochimsen v. Los Angeles, 54 C.A. 715, 202 Pac.
902.

If municipally owned water, light, heat and power systems are "municipal affairs", it necessarily follows that a municipally owned airport is a "municipal affair".

On the other hand all *private* public utility water systems are under the jurisdiction of the Public Utilities Commission of the State. In fact all private public utilities are subject to the jurisdiction of the State Public Utilities Commission.

The State Supreme Court long ago ruled that municipally owned utilities were not under the jurisdiction of the State. This was amply pointed out to the Court in *Durant v. City of Beverly Hills* (1940), 39 C.A. 2d 133, 137, 102 P. 2d 759:

"The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to 'establish and operate' public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. (*City of Pasadena v. Railroad Com.*, 183 Cal. 526, 534 [192 Pac. 25, 10 A.L.R. 1425]; *Jochimsen v. Los Angeles*, 54 Cal. App. 715, 716 [202 Pac. 902].) The power of the city to furnish services to inhabitants outside its boundaries is a part of the constitutional grant found in section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the in-

habitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants.”

In *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

“The present Railroad Commission was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities.”

See also *City of Pasadena v. Railroad Com.* (1920), 183 Cal. 526, 192 P. 2d; *Bowles v. City and County of San Francisco* (1946), 64 Fed. Supp. 609; *Jochimsen v. City of Los Angeles* (1921), 54 C.A. 715, 202 P. 902.

A public utility owned and operated by a municipality can only forsake its own jurisdiction over its public utilities through an election as provided for by the provisions of the Public Utilities Code of the State of California. See: Sections 2901, 2904, 2906 and 2931.

The City cited both *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. 2d 611, and *Ebrite v. Crawford* (1932), 215 Cal. 724, to show that the California

Supreme Court regarded the operation of an airport as a "municipal affair". The Court misconstrued the purpose of the citations and stated:

"These cases support the view that the conduct of a municipal airport is a matter subject to State law."

San Francisco acquired its airport in 1926 prior to the amendment of the Municipal and County Airport Law (Cal. Stats. 1927, p. 458). The airport was not acquired under the State Airport Act as in the *Krenwinkle* and *Ebrite* cases, *supra*, as these cities acquired their airports under 1927 statute. The City's airport came into being under the provisions of California Statutes of 1911, Chapter 715, and Article XII of the Charter of 1900, as amended, it was acquired as a public utility just as the City acquired the Spring Valley Water System.

The fact that the Municipal and County Airport Law refers to "any such city and county" (San Francisco being the only one in the State) is of no significance, since the airport was already established by the City. It is common knowledge, that in the enactment of laws in this State, the Legislature always uses the expressions "city and county", "city", or "county". The enactment of general legislation pertaining to local governmental bodies must of necessity embrace all units of the State.

Of main importance to the issue at bar and completely overlooked by the Court was the ratification of the new Charter of the City and County of San Francisco in 1932 by the State Legislature.

The District Court pointed out that "the approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the Legislature." (Citing *Yosemite Etc. v. State Board of Equalization* (1943), 59 Cal. App. 2d 39.)

The City agrees that when the contract was entered into in 1942 with TWA it was a valid contract. That contract, however, embodied every provision of rates and charges for common use facilities at the airport under the legal schedule adopted in 1941 by the City, under its Charter powers. The City at the time of the contract was controlled by its Charter of 1932 and not the general Municipal and County Airport Law of 1927, which applied to cities and counties that had not legislated on the same subject matter.

Home Telephone Co. v. Los Angeles, 211 U.S. 274, emphasizes that a city must have express power through its charter to contract as to rates. No such power is given to the City through its Charter.

The interpretation of what can and cannot be done by authorities operating airports, especially "common use facilities" is ably expressed by the Court in *Hillsborough County Aviation Authority v. National Airlines* (1953), 60 So. 2d 61, 48 ALR 2d 1056.

The contract of 1942 was valid when entered into because the rates and charges set forth in the contract were the valid rates for the "common use facilities". Those rates applied to all air carriers not to TWA—alone. If the rates set forth in the contract *were special rates* and not subject to further regulation by the City, as a matter of law, the contract was *ultra*

vires, for the City is not empowered to divest itself of its police power.

Sections 121, 122, 125 and 130 of the Charter are the controlling laws as far as San Francisco is concerned in its operation of the airport.

WHAT DO THESE SECTIONS SAY? They make of the airport a public utility under jurisdiction of the Commission of the City. Section 130 of the Charter makes it mandatory for the Public Utilities Commission to establish rates and charges for furnishing of service by any utility under its jurisdiction. The airport is clearly recognized as a public utility under the Charter (a municipal affair), and by the State of California because the Legislature approved the Charter in 1932.

IV.

IF THE OPERATION OF THE AIRPORT IS NOT A MUNICIPAL AFFAIR, IT MUST BE A FEDERAL AFFAIR CONTROLLED BY THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED, THEN THIS COURT IS WITHOUT JURISDICTION.

Assuming without admitting, that the Court is correct, that the City can enter into a contract giving a preference of rates and charges for the common use facilities at the airport, the City submits that such a contract must first be approved by the Civil Aeronautics Board, since it would be a "federal affair".

The evidence is uncontradicted that the contract in question gives to TWA lower rates for the common

use facilities than those charged to ten other air carriers using the same common use facilities.

In *S.S.W., Inc. v. Air Transport Ass'n of America* (1951), 191 Fed. 2d 659, where it was complained that American Airlines, TWA, Braniff Airlines, Colonial Airlines, Eastern Airlines, Capital Airlines, Northwest Airlines, Pan American Airlines and United Airlines had entered into an agreement which violated the anti-trust laws. The Court ruled that recourse must first be sought through the Civil Aeronautics Board, and remanded the case to the District Court until the Civil Aeronautics Board had determined if the contract in question was violative of the provisions of the Civil Aeronautics Act of 1938, as amended.

The Court stated:

“The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an ‘agency authorized to supervise almost every phase of the regulated company’s business.’ ”

The Court further states (p. 662):

“It provides that ‘Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of *every contract or agreement* (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other

air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.' ”

In the case at bar there is no showing that TWA had its contract approved by the Civil Aeronautics Board by which it claims it is entitled to a preference in rates for the common use facilities as against the other air carriers using the same facilities under rates and charges legally promulgated by the Public Utilities Commission of the City.

The Civil Aeronautics Act provides for detailed and comprehensive economic regulation by the Board. It has control of certificates of public convenience and necessity (49 USCA, Section 481); supervision of rates and services (49 USCA, Section 484); authority over mail rates (49 USCA, Section 486); loans and financial aid from United States agencies (49 USCA, Section 490).

Further, the Board is empowered to initiate or hear complaints of “unfair or deceptive practices or unfair methods of competition in air transportation,” and to issue cease and desist orders against such practices or methods of competition (49 USCA, Section 491).

The Board also has control of pooling or other agreements and the right to approve or disapprove such agreements (49 USCA, Section 492).

49 USCA, Section 1110 provides:

“As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—(1) the airport to which the project relates will be available for public use on fair and reasonable terms and *without unjust discrimination*.”

In *S.S.W., Inc. v. Air Transport Ass'n of America*, supra, the Circuit Court remanded the case to the District Court, as being consistent with *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U.S. 422, 433; 60 S.Ct. 325, 331; 84 L. Ed. 361, in which the Supreme Court said:

“When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding.”

There is presently before the Civil Aeronautics Board in Docket No. 7324, a case analogous to the instant matter. The case pertains to Miami International Airport regarding leases which provide for schedules of landing charges on a sliding scale decreasing the rates to the tenant as airport use by the

tenant increased. Irregular domestic carriers and foreign carriers filed a complaint against the lessees and Dade County Port Authority charging violation of Sections 404 (b), 411, 1102 and 205 of the Civil Aeronautics Act. Acting Chief Counsel for the Office of Compliance ruled that the Board did not have jurisdiction. However, the complainants have filed an appeal from the ruling asking the Board to reverse the ruling, or, in the alternative, to launch an investigation. The matter is still pending.

If the Civil Aeronautics Board is a regulatory body empowered to administer the Act, such as the Interstate Commerce Commission and the Maritime Commission, jurisdiction should be accepted in Docket No. 7324.

Likewise, the TWA contract giving it preference over other air carriers using the common use facilities at the San Francisco International Airport should be approved by the Civil Aeronautics Board before this Court takes jurisdiction of the matter.

If the judgment in *S.S.W., Inc. v. Air Transport Ass'n of America*, supra, is followed by this Court, this matter should be remanded to the District Court until such time as the ruling is made by the Civil Aeronautics Board, upon the right of the City to enter into a contract giving preference rates to TWA and regulating the rates for the same facilities for ten other scheduled air carriers.

We submit that if the matter before this Court is a "federal affair" the primary jurisdiction rests in the Civil Aeronautics Board.

V.

IF THE OPERATION OF THE AIRPORT IS NEITHER A MUNICIPAL NOR FEDERAL AFFAIR, IT MUST BE A STATE AFFAIR CONTROLLED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THEN THIS COURT IS WITHOUT JURISDICTION.

Regulatory power must rest in some governmental body if discrimination in the use of facilities common to all air carriers is to be avoided. The City insists that under Section 130 of the Charter it is empowered to regulate the rates and charges for the common use facilities at the airport.

This Court, in reviewing the *Krenwinkle* and *Ebrite* cases, *supra*, states:

“These cases support the fact that the conduct of municipal airports is a matter subject to state law.”

Assuming, without admitting, that the operation of an airport by a municipality is a “state affair”, the contract in question as to the common use facilities would be *ultra vires*, since it gives preference to TWA.

Section 453 of the Public Utilities Code of the State of California provides:

“§453. *Preferential rates prohibited.* No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or

in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 728 provides:

"§728. *When fixing of rates by commission required.* Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules practices or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices or contracts to be thereafter observed and in force."

Section 729 provides:

"§729. *Commission's authority upon hearing.* The commission may upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number thereof or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

Even if the State owned or *controlled* the airport, the contract in the instant case would be void. Section 21637 of the California Public Utilities Code provides:

“§21637. *Contracts, etc., for operation of airports, etc.* In operating an airport or air navigation facility owned or controlled by the State, the commission may enter into contracts, leases, and other arrangements for a term not exceeding 20 years with any person, granting the privilege of using or improving the airport or air navigation facility or space therein for commercial purposes, conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility, or making available services to be furnished by the commission or its agents at the airport or air navigation facility. In each case the commission may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with regard to the property and improvement used and the expenses of operation to the State. In no case shall the public be deprived of its rightful, equal, and uniform use of the airport, air navigation facility, or portion of either. The commission shall grant no exclusive privilege for the sale or delivery of gasoline or other petroleum products.”

If the regulation of rates and charges of common use facilities that TWA complains is in violation of the contract of 1942 and the question is a “state affair”, according to the decision of this Court, then Section 1702 of the California Public Utilities Code provides TWA its remedy. Section 1702 holds:

“Who may make complaint: When complaint may be made. Complaint may be made by the

commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water or telephone service."

CONCLUSION.

Rehearing should be granted in the instant case because the Court has failed to decide vital issues affecting a great nationwide industry. Every municipality throughout the United States owning and operating an airport will be affected by the decision of this Court.

The appellees and cities, counties and states throughout the nation desire a judicial determination of these questions regarding their airports:

1. Are airports public utilities?
2. Can municipalities, as owners and operators of an airport give preferential rates to some air carriers by contract and regulate other carriers in the same classification?
3. Is the ownership and operation of an airport by a municipality a "municipal affair", "federal affair", or "state affair", and subject to regulation according to the charter of the municipality or the laws of the state, or the Civil Aeronautics Act of 1938, as amended?

We submit for the foregoing reasons that rehearing should be granted in this matter.

Dated, San Francisco, California,
January 16, 1956.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that I am City Attorney of the City and County of San Francisco and one of the counsel for appellees and petitioners in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 16, 1956.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
*Counsel for Appellees
and Petitioners.*

No. 14,523

United States Court of Appeals
For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,

a corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

a municipal corporation, et al.,

Appellees.

APPELLANT'S REPLY TO
APPELLEES' PETITION FOR A REHEARING.

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No. 14,523

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TRANS WORLD AIRLINES, INC., a corporation, vs. CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al.,	}	<i>Appellant,</i> <i>Appellees.</i>
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**APPELLANT'S REPLY TO
APPELLEES' PETITION FOR A REHEARING.**

The City's petition for a rehearing has two main aspects:

(1) In part it reargues certain points debated in the briefs and perfectly understood by the court, as the opinion demonstrates;

(2) In part it presents an argument never before made at any stage of the case, namely, that the contract in suit is invalid under the Civil Aeronautics Act of 1938 (49 U.S.C. 401, et seq.) and the Federal Airport Act (49 U.S.C. 1101-1119). We will not labor the point that this contention is a complete afterthought; we submit in an-

swer to it, and will show by reference to these statutes, including each provision thereof cited by the City, that they have nothing to do with business arrangements between airports and airlines such as the case at bar involves, and contain nothing in derogation of the validity of the contract in suit. Generally speaking, the Federal Airport Act provides for money grants in aid of airport construction and development; the Civil Aeronautics Act relates to such matters as certification of airlines; regulation of rates charged by air carriers to the traveling public; safety rules for flight operation and like matters.

Turning to an answer of the specific arguments made in the petition for rehearing and in the order there presented, we submit:

Pages 2-5. There is no merit in the claim that the case should be reopened because this court did not decide whether operation of the "airport, especially the common use facilities, is a public utility business." The question is immaterial; the City had statutory authority to make the contract in suit, and the contract is, therefore, binding whether the case involves a public utility relationship or not. This point was fully argued in the briefs. Concerning it, the court said (Opinion, pp. 7-8):

"Where, however, the municipality enters into a contract pursuant to express statutory authority to contract, the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail."

The two sections of the California Public Utilities Code cited in the City's petition (pp. 4-5) deal with the defini-

tion of public utilities and with the conditions under which municipalities may operate utilities outside their corporate boundaries. Both sections are immaterial because it is immaterial to the present case whether the airport or part of it is a public utility or not.

The same cases as are cited in the City's petition for rehearing (p. 3) were cited in the City's brief. All of them are of the character distinguished in the court's opinion (p. 5). They have no bearing on the validity of the contract between the City and TWA, but deal with such propositions as that municipalities can conduct airports and spend public funds for airport purposes.

Pages 5-11. The claim that this court's decision "will create a chaotic condition in the aviation industry" has no semblance of reasonable foundation. The City recognized the TWA contract for seven years before it claimed any right to alter it by exercising powers of rate regulation. During these years the airport had tremendous growth which still continues. Further, as pointed out in our briefs, the City *today disclaims power of rate regulation* over scores of enterprises operating at the airport (TWA Opening Brief, pp. 12-13, pp. 46-47; Reply Brief, p. 18). It *disclaims today* regulatory power over part of the subject matter of the contract in suit, specifically acknowledging its authority to contract with the airlines regarding shop space, hangar rentals, etc. (TWA Opening Brief, pp. 3-4). Under these circumstances "chaos" certainly will not result from the court's decision upholding the City's authority as specifically granted by State statute to contract with the airlines concerning the common use facilities.

The argument that the City "cannot discriminate or give a preference" has no application to this case. A *difference* established by a valid contract made under valid statutory authority is not *per se* unreasonable and is not a preference or *discrimination* in any invidious or illegal sense. Implicit in any grant of contracting power is that the terms of contracts made under such power may be different. Many cases to this effect were cited in TWA's reply brief (pp. 19-20) in answer to the same point of "discrimination" in the City's brief as is now repeated in the petition for rehearing.

At page 7 the City cites 49 U.S.C. 1110. This is a section in the Federal Airport Act, which statute, as said above, provided federal aid for airport development. The section quoted by the City says that airports to which such provision relates must be available for public use "without unjust discrimination." This does not advance the City's case because the differential here involved for the reasons already given and under cases already cited, is not "discrimination." Further, the Federal Airport Act has nothing to do with business arrangements of the kind in suit between airlines and cities conducting airports; to the contrary it clearly contemplates that airports to which federal aid is extended are to be managed by the local authorities.

Also on page 7 the City quotes from the Civil Aeronautics Act of 1938 (49 U.S.C. 402). Again the quotation is pointless because there is no "discrimination." Further and fundamentally, the Civil Aeronautics Act does not purport to deal with the subject matter of the case at bar, and the jurisdiction of the Civil Aeronautics Board, cre-

ated by the statute, of course extends only to matters which the statute specifies.

The City's petition then goes back to the Federal Airport Act (49 U.S.C. 1101(a)), and quotes therefrom the definition of a public airport. It is obvious from the quotation that it has no bearing on the validity of the TWA contract.

The City then returns to the Civil Aeronautics Act (49 U.S.C. 484(b)), and cites the provision that "*no air carrier*" shall give any unreasonable preference to particular persons, localities or types of traffic. Again the quoted section by its terms does not apply to this case.

On page 8 the City says that charges for the common use facilities at the airport "must of necessity be non-discriminatory," citing three Supreme Court cases which are not in point. Each of these cases dealt with discrimination *by common carriers against shippers* and turned on express prohibitions of the Interstate Commerce Act as amended. The case at bar is not concerned with relationships between the common carrier airlines and their passengers or freight shippers. Similar considerations apply to the fourth case cited by the City on this point (*California v. United States* (1944) 320 U.S. 577 (Petition, p. 10)) which arose under the Shipping Act of 1916, and involved practices with regard to shippers, which were prohibited by that statute.

Pages 11-18. That the airport is not a municipal affair is settled by the California cases cited by the court. The municipal affair point was argued at length in the briefs. Everything said by the City in its petition for rehearing

was said in its brief. The cases cited in the City's petition are the same cases as cited in the brief.

That section 19 of Article XI of the State Constitution (cited at page 11 of the Petition) is immaterial was, we submit, demonstrated in TWA's reply brief (pp. 11-14). Nor is it material that the Municipal and County Airport Law of 1927 (Cal. Stats. 1927, p. 485) was passed after the City first acquired an airport. The material time factor is that the statute authorizing the TWA contract was in effect in 1942 when the contract was made.

The City also argues (p. 16) that since the Legislature ratified the 1932 Charter of the City it follows that the Charter controls the State statute. The Charter, however, is controlling only with respect to municipal affairs, as is clear from the California cases cited by the court.

Pages 18-22. Here the City argues that the case, if not involving a municipal affair, must involve a "federal affair"; hence that the contract in suit would not be valid without approval by the Civil Aeronautics Board. But the Civil Aeronautics Act contains nothing to support such a contention. Obviously the provisions referred to at pages 20-21 of the City's petition do not even touch the subject matter of this suit.

The City's citation of *S. S. W. Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 659, is not in point. There the court remanded for initial determination by the Civil Aeronautics Board a complaint charging certain air carriers with antitrust violations. The statute under which the complaint had been made provided for the filing with the Board of certain contracts "*between such air carrier and any other air carrier.*"

At pages 21-22 the City refers to an opinion of the Acting Chief Counsel for the Office of Compliance advising the Civil Aeronautics Board that it had *no jurisdiction* over alleged illegality in landing charges to airlines made on a sliding scale by the Miami International Airport, the City's point being that the complainants took an appeal to the Board from this ruling. However, the Board on January 12, 1956, *affirmed the Acting Chief Counsel and dismissed the complaint* (In the Matter of the Complaint of Various Air Carriers and Foreign Air Carriers Serving Miami, Florida, The Civil Aeronautics Board, Docket No. 7324, Order No. E-9911).

Pages 23-26. Here the argument is made that if the contract in suit is not subject to utility rate legislation under the City Charter or under federal statutes, then it must be subject to regulation by the Public Utilities Commission of California. The alleged reason for this is that "Regulatory power must rest in some governmental body" (Petition, p. 23). No such generalization can be made—the basic point of the case at bar is that where a municipality has statutory power to contract and does contract, the regulatory power which it might ordinarily have over the subject matter is suspended with respect to that contract.

There is nothing in any of the state statutory provisions cited in the City's petition, and no provision anywhere in the Public Utilities Act or the California Constitution which gives the Public Utilities Commission any authority or duty with regard to the contract in suit. The Commission's power to regulate intrastate rates of common carriers by air as held in *People v. Western Air Lines, Inc.*

(1954) 42 Cal.2d 621, 268 P.2d 723, obviously has no bearing on the question before this court.

Pages 26-27. We submit that the questions in this case were correctly understood and correctly decided by the court, and that the petition should be denied.

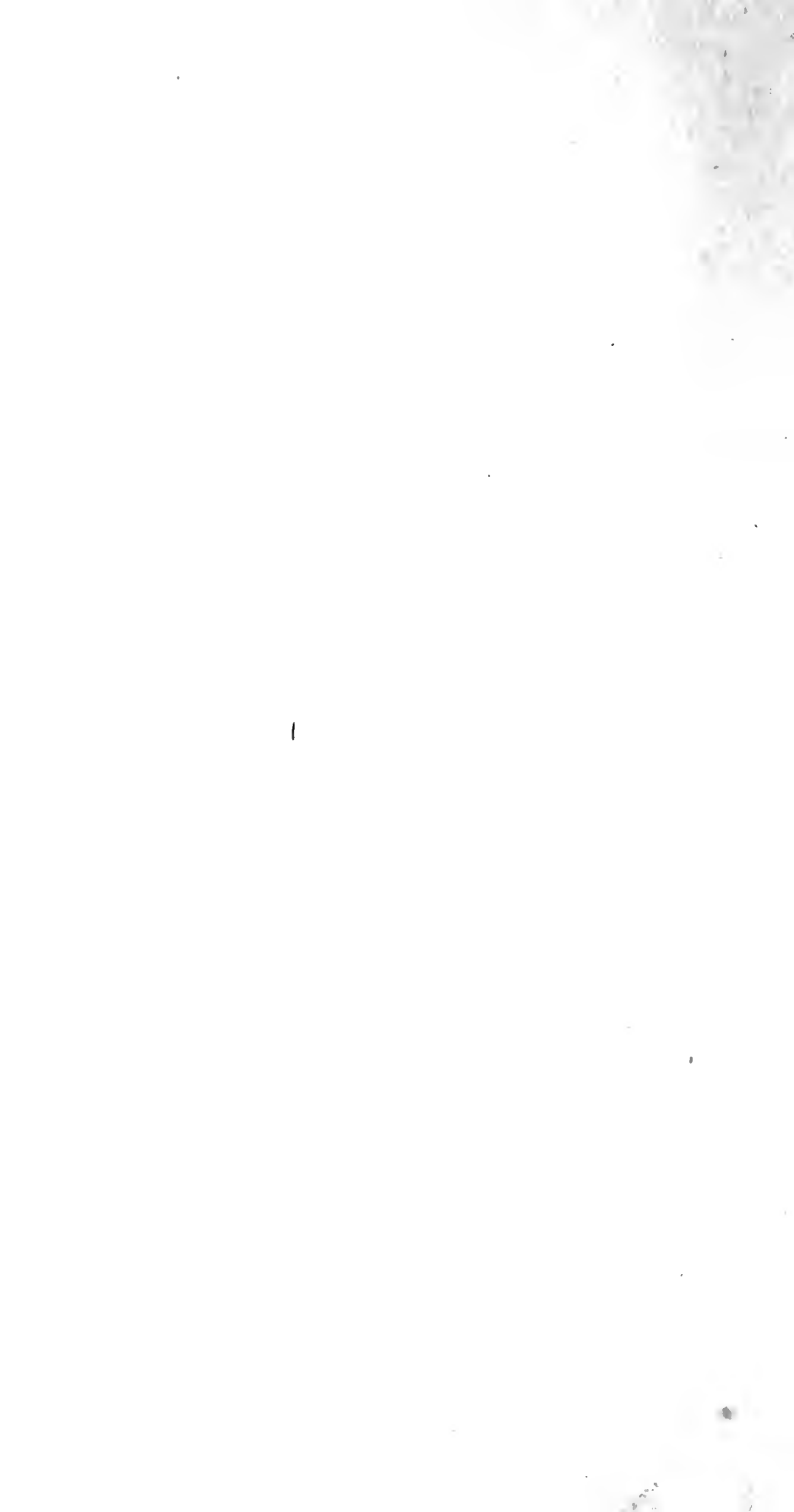
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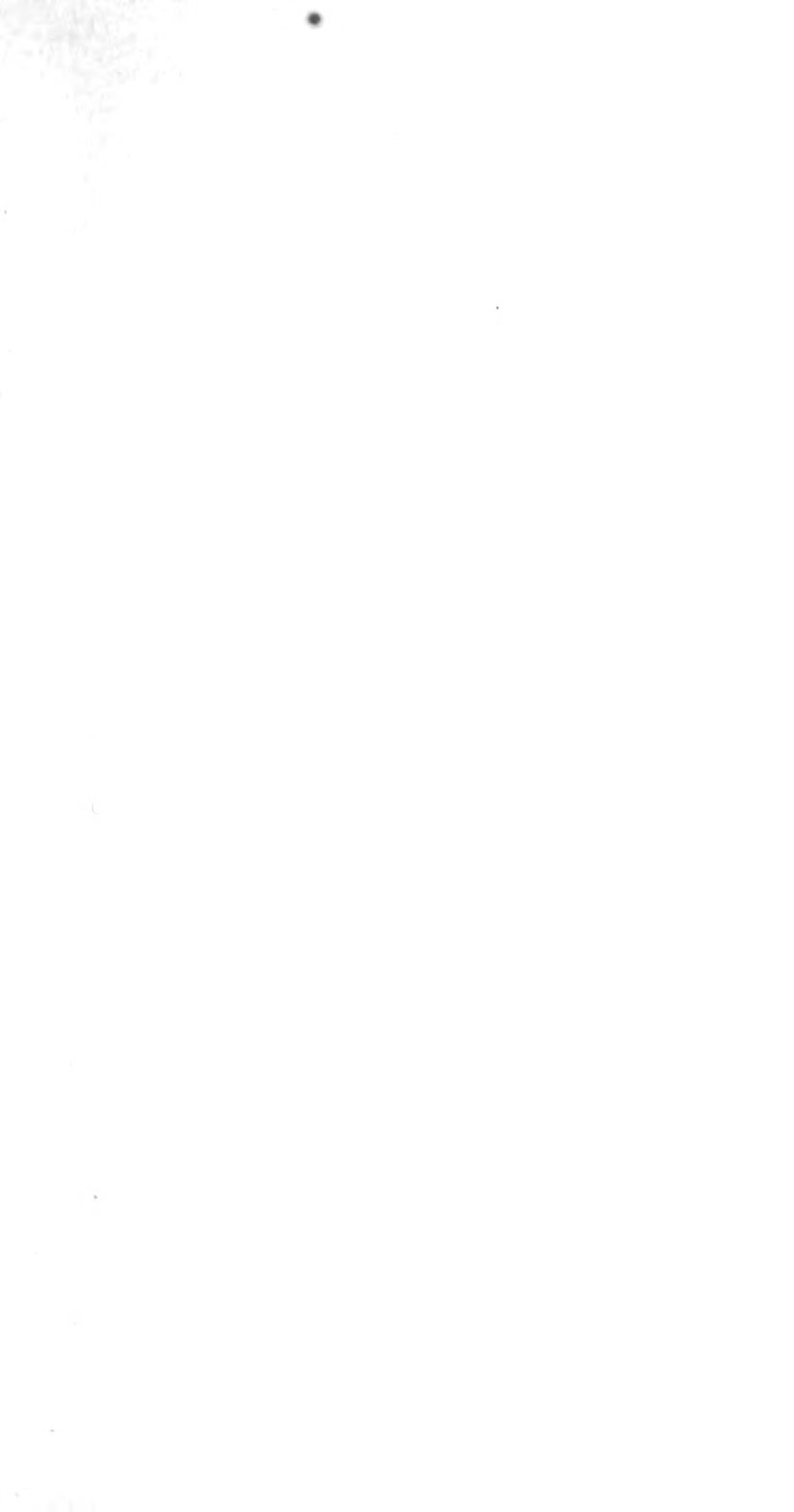
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